Health and Safety at Work

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Health and Safety at Work

European and Comparative Perspective

Edited by

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CHAPTER 7

Italy: From Occupational Health and Safety to Well-being at Work

Edoardo Ales, Luca Miranda and Alessia Giurini

§7.01 INTRODUCTION

In the Italian legal order, the regulation of occupational health and safety is characterized by an imposing body of legislation. Initially the means of realizing certain constitutional precepts,[1] this then formed the fulcrum for implementing the Community preventive standards outlined by Directive 89/391/EEC (hereinafter 'Framework Directive') and its so-called daughter Directives.[2]

Recently, the adoption of Legislative Decree no. 81/2008 has drastically reorganized the national law by pursuing the *reductio ad unum* of the general and sectoral legislation on the subject.[3]

1. See G. Natullo, *La tutela dell'ambiente di lavoro* (Turin: Utet, 1995); L. Galantino (ed.), *La sicurezza del lavoro* (Milan: Giuffrè, 1996); L. Montuschi (ed.), *Ambiente, salute e sicurezza,* (Turin: Giappichelli, 1998); M. Rusciano & G. Natullo (eds.), *Ambiente e sicurezza del lavoro*, (Turin: Utet, 2007); P. Albi, *Adempimento dell'obbligo di sicurezza e tutela della persona. Art. 2087 c.c.*, Vol. of *Il Codice Civile. Commentario. Fondato da P. Schlesinger,* ed. F.D. Busnelli (Milan: Giuffré, 2008).
2. M. Biagi (ed.), *Tutela dell'ambiente di lavoro e direttive CEE* (Rimini: Maggioli, 1991).
3. P. Pascucci, 'Dopo la legge n. 123 del 2007. Titolo I del d.lgs. 9 aprile 2008, n. 81 in materia di tutela della salute e della sicurezza nei luoghi di lavoro', http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DAntona/WP%20CSDLE%20M%20DAntona-IT/20111025-121117_pascucci_n73-2008itpdf.pdf > , vol. 73; M. Tiraboschi (ed.), *Il testo unico della salute e sicurezza nei luoghi di lavoro. Commentario al decreto legislativo 9 aprile 2008, n. 81* (Milan: Giuffrè, 2008); L. Zoppoli, P. Pascucci & G. Natullo (eds.), *Le nuove regole per la salute e la sicurezza dei lavoratori, Commentario al D.lgs. 9 Aprile 2008, no. 81* (Milan: Ipsoa-Wolter Kluwer 2008); L. Montuschi (ed.), *La nuova sicurezza sul lavoro. D.lgs. 9 aprile 2008, n. 81 e successive modifiche* (Bologna: Zanichelli, 2011); M. Persiani (ed.), *Il nuovo diritto della sicurezza sul lavoro* (Turin: Utet, 2012).

In the light of such facts, it appears appropriate briefly to reconstruct the subject-matter's regulation, before considering the cardinal principles and important novelties that Legislative Decree no. 81/2008 contains.

A first area of analytical reconstruction cannot fail to take account of the fundamental principles contained in Articles 32(1), 35(1) and 41(2) of the Constitution, which are closely interconnected.

First of all, health is the object of specific provision in Article 32(1) of the Constitution.[4] The emphasis here is on a consideration of the protection of citizens' health (and, consequently, of working conditions themselves) as a fundamental social right. It therefore follows that the right to a safe workplace and to safe working conditions may be included, at a national level, within the wide-ranging catalogue of fundamental personal and workers' rights.

Article 32(1) of the Constitution has another, equally important feature. Its effect is simultaneously 'individual' (creating as it does a fundamental personal right) and 'collective' (referring as it does to the collective interest in health protection). It specifically places health at the centre even of relationships between private parties[5] and permits the natural tensions between the merely individual/contractual dimension of the work relationship and the affirmation of collective rights to be overcome.[6] This is by virtue of the intrinsically collective value of the right to health protection.

Article 35(1) of the Constitution is closely connected to this fundamental provision. Although included amongst the provisions regarding economic relations, it asserts the need to protect work in all its forms and practices.

As a consequence, the combined effect of Articles 35(1) and 32(1) requires the protection of health not only in situations of employed work but also in those of self-employed work or, in any event, work carried out in the context of another party's production organization.[7] Such fact is closely linked to one of the most important innovations contained in the recent preventive legislation, namely, the distinctive concepts of worker and employer for the purposes of safety. These concepts (to which we will return) impose a duty to protect safety at work also on figures that in the past were uncovered and under-protected.

Another aspect of primary significance may be found in the close interrelation between Articles 32(1) and 41(2)[8] of the Constitution, if one only considers how the

4. 'The Republic shall protect health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the poor.'
5. See, by way of example, *Corte Costituzionale,* Judgement no. 88/1979, *Giustizia Civile,* no. 3 (1979): 121, according to which health, as a good, 'is protected by Article 32 of the Constitution, not only as a collective interest but also, and above all, as a fundamental individual right, so that it takes the form of a primary and absolute right that is also fully operative in relations between private parties. It is certainly to be included amongst the subjective positions that are directly protected by the Constitution'.
6. See G. Balandi, 'Individuale e collettivo nella tutela della salute nei luoghi di lavoro: l'art. 9 dello Statuto', *Lavoro e Diritto,* no. 1 (1990): 222 et seq.; C. Zoli, 'Sicurezza del lavoro: contrattazione e partecipazione', *Rivista Giuridica del Lavoro,* no. 3 (2000): 614 et seq.
7. See *Corte di Cassazione* (*Sezione Lavoro*), Judgement no. 45/2009.
8. The first two sections of Article 41 specify, 'Private-sector economic initiative shall be free. It cannot be conducted in conflict with social usefulness or in such a manner that it could damage safety, liberty or human dignity.'

identification of workers' safety as a good of constitutional importance requires entrepreneurs to put the safety of the person supplying such service before their own profit or economic saving.

It follows that health, being both a fundamental worker's right and a collective interest, cannot be considered merely desirable or just one aspect of production management. Its protection constitutes, rather, a specific *sine qua non* for the pursuit of an activity.[9]

At the level of ordinary legislation, Article 2087 of the Civil Code constitutes the cornerstone of the national preventive structure. Although it precedes the constitutional provisions in temporal terms, Article 2087 has, through its constitutionally-oriented interpretation by legal academics and in the case law, become the alpha and omega of the whole system protecting health and safety at work.

By providing that 'in the exercise of their business activity, entrepreneurs shall adopt the measures that, according to the particular nature of the work, experience and technology, are necessary to protect the physical, mental and moral integrity and general dignity of their employees', Article 2087 identifies the employer's contractual duty to ensure safety as a general principle (or, more correctly, duty) from which all the specific duties of prevention derive.[10] We will subsequently consider this point in detail.

Alongside such fundamental provisions, the national legislation preceding transposition of the Community provisions was highly fragmented. Such fact is evidenced by Presidential Decrees nos. 547/1955 and 303/1956, which identified specific, detailed employers' duties closely correlated with the 'business' sector of production and the nature of activity pursued.

Together with a close application and evolutive interpretation of Article 2087 of the Civil Code, the legislation of the 1950s permitted a particularly stringent system for protecting workers' health to develop and, thanks to the *Corte di Cassazione,* in particular, one capable of constituting a solid point of reference for preventive safety at work.

Nevertheless, it proved impossible to adapt the said preventive system of the 1950s to the different approach towards protection of occupational health and safety contained in the Framework Directive. The Italian legislator was therefore obliged to meet the Directive's requirements by issuing further, new legislation on the subject. This took the form of Legislative Decree no. 626/1994, which implemented the Framework Directive and a part of its so-called daughter directives.

As a result, the national preventive system was characterized for more than a decade by a highly fragmented regulation that risked seriously compromising both certainty as to the law and full regulatory adaptation to important new categories of risk.

Such problems, combined with persistently worrying statistics both for accidents and deaths at work and for occupational diseases, pushed the government to exercise

9. L. Montuschi, *Diritto alla salute e organizzazione del lavoro* (Milan: Giuffrè, 1980).
10. On this point, see *Corte Costituzionale*, Judgement no. 384/2005 and Judgement no. 50/2005, published in the Official Journal on 19 October 2005 and 2 February 2005, respectively.

the power delegated under Act no. 123/2007 and pass Legislative Decree no. 81/2008. This was a particularly innovative regulatory text and one capable of meeting the need to reorder and rationalize the preventive legislation at both a general and a sectoral level.

§7.02 BASIC CONCEPTS

[A] Risk Prevention and Protection from Risk

Italian health and safety law is characterized by an imposing number of definitions that expound the preventive legislation's fundamental concepts. The definitions of 'risk prevention', 'protection from risk' and 'health' are particularly important for our purposes.

In truth, the national legislation takes the definition of 'prevention' contained in the Framework Directive, understood as 'all the steps or measures taken or planned at all stages of work in the undertaking to prevent or reduce occupational risks'. It extends its meaning, however, adapting it to the interpretation of Article 2087 of the Civil Code evolving in the case law over the years.

Thus, the legislator defines 'prevention' as 'all the steps or measures that are necessary, including according to the particular nature of the work, experience and technology, to prevent or reduce occupational risks whilst fully respecting the health of the population and the integrity of the environment' (Article 2(1)(n) of Legislative Decree no. 81/2008).

Precisely the reference to the particular nature of the work, experience and technology allows the problem of the lack of an express definition of 'protection' to be overcome. In this way, an approach to the protection of occupational health and safety that is capable of adapting to different new possible sources of risk is imposed.

This evolutive approach to the concept of 'prevention' is closely linked to the extension of the legislation's scope of application to all undertakings and all types of risk, as well as to employers' general duties. It permits the presumption of an employer's safety duty that borders on the Community concept of precaution (see Article 191(2) TFEU[11]). Such a duty will exist in the presence of three key elements: identification of all the potential risks; a full and rigorous scientific assessment carried out on the basis of all existing data and, lastly, the lack of a scientific certainty that permits the presence of identified risks to be reasonably excluded. All these elements are present in the national system managing health and safety at work.

11. 'Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.'

[B] The Concepts of 'Health', 'Danger' and 'Risk'

The national legislator then enunciates other important concepts. The first of these is the concept of 'health', taken from the definition given by the World Health Organization (WHO) in the preamble to its Constitution. Pursuant to Article 2(1)(o) of Legislative Decree no. 81/2008, 'health' is 'a state of complete physical, mental and social well-being and not merely the absence of disease and infirmity'.

The equating of health with the mere absence of disease and infirmity is therefore rejected and the concept of 'well-being', in the triple sense of physical, mental and social, is adopted as the point of reference. Thus, the tie with the notion of 'well-being at work' outlined by the European Commission in its last two Strategies on Health and Safety at Work (2002–2006, 2007–2012)[12] is recovered.

In this way, what some legal academics define as 'an "integral" notion of health that includes both physical and mental well-being and therefore combats the stress, monotony and repetitiveness of work'[13] is achieved.

Thanks to these spurs deriving mainly from international and Community contexts, the need for a global approach to well-being at work is beginning to emerge. It is no longer sufficient to intervene with the sole aim of reducing the number of accidents or the incidence of occupational disease. Prevention of the so-called social risks, namely, stress, depression, anxiety, harassment in the workplace, mobbing and discrimination, is also fundamental.

To the abovementioned definitions should be added the further notions of 'risk' and 'danger'. From these it is possible to derive a dynamic, wide-reaching and evolutive protection of the working environment that is capable, in theory, of constantly adapting the protection of workers to the particular nature of the workplace.

In this perspective, 'danger' is the capacity that any given entity has to cause a worker harm, whereas 'risk' pinpoints the probability that an event that is harmful to a worker may occur. To such end, Article 2(s) of Legislative Decree no. 81/2008 defines 'risk' as the probability of reaching the 'potential harm' level in working conditions or of being exposed to a given factor or agent or to a combination of the two. Risk arises when there is, contemporaneously, a danger and a worker exposed to it.[14]

Analogously, Article 2(r) of Legislative Decree no. 81/2008 defines 'danger' as the property or quality of a given factor that is intrinsically capable of causing harm. The term therefore refers to a given entity's harmful potential, understood in the sense of a work process, a working tool, work equipment or a chemical, physical or biological agent.

It is, therefore, essential to distinguish between the concepts of 'danger' and 'risk'. These are fundamentally different, insofar as danger encompasses the certainty that the adverse event will occur, whereas risk only implies the probability, with the

12. Cf. COM (2002) 118 (not published in the Official Journal) and COM (2007) 62 – final.
13. B. Caruso, 'L'Europa, il diritto alla salute e l'ambiente di lavoro', in *Ambiente, salute e sicurezza,* ed. L. Montuschi (Turin: Giappichelli, 1998), 4 et seq.
14. M. Masi, 'Il rischio: le ragioni di una disciplina in materia di sicurezza', in *Il testo unico della salute e sicurezza nei luoghi di lavoro,* ed. M. Tiraboschi (Milan:Giuffrè, 2008), 377 et seq.

consequence that it will not be possible to eliminate risk as long as a source of danger exists.

[C] Risk Deriving from Interference and Its Relevance in the Building Sector

One of the most important innovations in the national legislator's recent modifications to the system governing occupational health and safety concerns risk deriving from interference i.e., those risks present when the activities of other undertakings or self-employed workers become part of an employer's organized production structure 'through outsourcing "within" the production process'.[15]

Legislative Decree no. 81/2008 therefore also includes 'risk deriving from interference' amongst the basic concepts in occupational health and safety. This particular concept gives rise to a series of stringent duties for the so-called commissioning entity, the most important of which is the duty to assess the situation and draw up a consolidated risk-assessment document.

The legislator's intervention is thus a response to the need to tackle a phenomenon constituting a considerable threat to the safety of workers operating in complex business structures. This is the contemporaneous presence of the specific risks attaching to individual undertakings' activities and risks deriving both from the concomitant presence of employees from different undertakings and from reciprocal interference with the various activities carried out in the same theatre of work.[16]

The above assumes a particular importance with regard to the duties imposed on undertakings operating in the building sector. Risk deriving from interference constitutes one of the greatest sources of danger for these undertakings, by virtue of the potentially multiple forms of work that may be performed on worksites where there is contracting or sub-contracting and that involve a main undertaking, sub-contractors, self-employed workers and suppliers of materials.

The risk deriving from interference with the commissioning entity's workplace (and, possibly, workers) caused by the activity of workers from 'outside' undertakings, therefore assumes a central importance in the building sector and one that the legislator has deemed necessary to refer to specifically. Legislative Decree 81/2008 explicitly creates the duty to draw up a specific document on the risk from interference and requires such document to be given to all contractors entrusted with works under procurement contracts and works contracts.

15. As the *Corte di Cassazione* (*Sezione lavoro*) expressed it in its Judgement no. 45/2009.
16. P. Pascucci, 'Dopo la legge n. 123 del 2007. Titolo I del d.lgs. 9 aprile 2008, n. 81 in materia di tutela della salute e della sicurezza nei luoghi di lavoro', http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DAntona/WP%20CSDLE%20M%20DAntona-IT/20111025-121117_pascucci_n73-2008itpdf.pdf > , vol. 73, 112; L. Angelini, 'La tutela della salute e sicurezza negli appalti prima e dopo il d. lgs. n. 81/2008', < www.uniurb.it/olympus > , 12 June 2008.

§7.03 PERSONAL SCOPE OF APPLICATION

[A] The National Legislation's Application to All Sectors of Production and All Types of Risk

An important feature of the current national legislation is its application to all sectors of activity, whether private or public, and to all types of risk.[17]

Legislative Decree no. 81/2008 thus does not draw distinctions based on the nature (i.e., entrepreneurial or non-entrepreneurial) or the type of activity pursued or, indeed, the dimensions of a business.

It is precisely this extension of the law's scope of application to all private and public sectors and all types of risk that constitutes one of the most important innovations of the new national preventive legislation. The other is its emphasis on the employer's primary duty to assess risks in the workplace.

The novelties introduced by Legislative Decree no. 81/2008 have a twofold effect. On the one hand, they remedy the highly fragmented nature of the previous legislation with its different rules for different sectors of production. On the other, they tend to guarantee that the law assumes a global approach to the problem of protecting safety at work. This is done by establishing an action programme that is truly centred on a culture of accident prevention and on a constant, planned protection of occupational health and safety, rather than intervening solely to establish rights and duties for employers and workers.

One of the most important innovations introduced by Legislative Decree no. 81/2008 is the lack of importance attached to the size of a business. This aspect is closely linked to the legislation's applicability to all types of activity and all risks, as well as the innovative all-inclusive concept of 'worker'.[18]

Indeed, even in the only case where the size of a business becomes important, the innovative concept of 'worker' has a decisive influence on the application of the related law. This occurs by virtue of sections 3, 4 and 7 of Article 47 of Legislative Decree no. 81/2008. In specifying the size limit of fifteen workers (which constitutes the dividing line between the election or designation of representatives from among a business's trade union representatives on the one hand and their direct election from among the workers, on the other), these no longer use the concept of 'employee' but, rather, that of 'worker'.

Thus an all-inclusive concept of 'worker' is also embraced for the purposes of applying the provisions on the participation and consultation of workers' representatives. This has the effect that, at least at the formal level and in the absence of any other

17. See P. Pascucci, 'Dopo la legge n. 123 del 2007. Titolo I del d.lgs. 9 aprile 2008, n. 81 in materia di tutela della salute e della sicurezza nei luoghi di lavoro', http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DAntona/WP%20CSDLE%20M%20DAntona-IT/20111025-121117
_pascucci_n73-2008itpdf.pdf > , vol. 73, 30 et seq.
18. P. Pascucci, 'Il campo di applicazione soggettivo delle nuove regole sulla salute e sicurezza nei luoghi di lavoro', *Diritti lavori mercati*, no. 2 (2008): 297 et seq.

legislative specification, representation includes parties not typically covered at the collective/trade union level.

[B] Specific Legislation Regarding Pregnant Women

The general applicability of Legislative Decree no. 81/2008 does not exclude further legislation governing specific categories of worker. One such category is that of pregnant workers and workers who have recently given birth or are breast feeding, in relation to whom specific regulations apply. These are currently contained in Chapter II of Legislative Decree no. 151/2001, which implemented Community Directive 92/85/EC.[19]

Law of this kind is based on the need to protect the health of female workers during the moment of greatest vulnerability i.e., during pregnancy and maternity. Indeed, such conditions necessitate specific and more detailed legislation than that envisaged either for female workers in general or for male workers.[20]

More specifically and in compliance with Directive 92/85, Legislative Decree no. 151/2001 requires employers to carry out a specific risk-assessment for pregnant workers and for workers who have recently given birth or are breast feeding. It further expressly identifies the measures that employers must adopt in order to avoid the related risks.

In the first place, employers must temporarily alter such workers' working conditions or working time (Article 12(1)). Should that prove impossible for organizational reasons or reasons linked to production, they must assign them different work duties.

An analysis of the Italian legislation clearly reveals the complementary relationship between Legislative Decree no. 151/2001 and Legislative Decree no. 81/2008.[21] The close continuity between them is evidenced by a series of references that Legislative Decree no. 151/2001 makes to Legislative Decree no. 626/94 (subsequently absorbed by Legislative Decree no. 81/2008), primarily regarding risk-assessment and workers' right to information. Without forgetting that Article 15 of Legislative Decree no. 81/2008 expressly provides that, 'Save as otherwise provided for by the present Chapter, the provisions contained in Legislative Decree no. 626 dated 19 September 1994, as subsequently amended, as well as every other provision regarding safety and health in the workplace, shall remain in force.'

This provision not only expresses the complementary relationship between Legislative Decree no. 151/2001 and Legislative Decree no. 81/2008 but also indicates the special nature of the law contained in the former vis à vis the general health and safety legislation.

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19. See F. Adinolfi & R. Bortone, 'Commento alla direttiva europea sulla tutela della maternità', *Giornale di diritto del lavoro e di relazioni industriali*, no. 1 (1994): 373 et seq.; M. Lai, 'Tutela della maternità nella legislazione europea', *Diritto e pratica del lavoro*, no. 2 (1993): 77 et seq.
20. F. Borgogelli, *Il lavoro femminile tra legge e contrattazione* (Milan: Franco Angeli, 1987), 189 et seq.
21. L. Calafà, 'Le lavoratrici madri', in *Ambiente e sicurezza del lavoro*, eds. M. Rusciano & G. Natullo (Turin: Utet, 2007), 394.

[C] The Distinctive Concepts of 'Worker', 'Employer' and 'Commissioning Entity'

Another important feature of the national legislation is the use it makes of wholly distinctive concepts of 'worker', 'employer' and 'commissioning entity'. Such use ensures that the prevention duties and the protection afforded parties extend beyond the confines of the contractual relationship.

To such end, the concept of 'worker' contained in Article 2(1)(a) has a preliminary importance. For the intents and purposes of Legislative Decree no. 81/2008, 'worker' is to be understood as the 'person who, independently of the type of contract, carries out a remunerated or unremunerated working activity within a public or private employer's organization, even for the sole purpose of learning a trade, art or profession, excluding domestic workers and family members'.

Thus an all-inclusive concept of 'worker' is embraced.[22] This not only covers employed workers (regardless of the various types of contract) but also workers that, albeit not employed by the employer, are nevertheless subject to his or her managerial authority (agency workers). It also covers those workers who have drawn up a contract for services with an employer, provided (obviously) that the service that is the object of such contract potentially (insofar as its provision is within the employer's organization) exposes them to health and safety risks deriving from the activity pursued by the employer.[23]

As regards self-employed people, however, the said extended application is important in relation to certain specific duties. These include the duty to procure individual preventive and protective equipment personally and use it within the business organization, over and above the general duty to equip themselves with personal identity cards.

Analogously and following the same line of interpretation, the legislator has also embraced a broad concept of 'employer'. Focussing on the function of managing safety at work, this figure is defined as the person who has full and effective power to organize the business.

To such end, Article 2(b) of Legislative Decree no. 81/2008 identifies a private sector 'employer' as the party in charge of the working relationship with the worker or, in any event, the party that, according to the type and set up of organization in which the worker provides his or her services, has responsibility for the organization itself or for the relevant production unit, insofar as s/he exercises the decision-making and spending power. In this respect, a recent judgment of the Criminal Division of the *Corte di Cassazione*[24] has upheld the macro-concept of 'employer' and included within the category whomsoever has, in all reality, the de facto role of employer. For safety

22. D. Venturi, 'Lavoratore: definizione e obblighi', in *Il testo unico della salute e sicurezza nei luoghi di lavoro,* ed. M. Tiraboschi (Milan: Giuffrè, 2008), 247 et seq.
23. P. Pascucci, 'Dopo la legge n. 123 del 2007. Titolo I del d.lgs. 9 aprile 2008, n. 81 in materia di tutela della salute e della sicurezza nei luoghi di lavoro', http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DAntona/WP%20CSDLE%20M%20DAntona-IT/20111025-121117_pascucci_n73-2008itpdf.pdf > , vol. 73, 33 et seq.
24. See *Corte di Cassazione* (*Penale, IV Sezione),* Judgement no. 36878/2009.

purposes, therefore, the position of 'employer' vis à vis workers reaches well beyond the existence of a formal employment relationship, whatever the nature of the contractual relationship may be. It coincides with the full and effective exercise of an employer's powers.

Within public authorities, however, employer's duties regarding workplace safety fall on the public servant with managerial authority or on an officer without managerial rank, but solely in those cases where the latter is in charge of an autonomous office, has been appointed by the individual authority's governing body and enjoys autonomous decision-making and spending powers.

Lastly, the same need for certainty as to the figure responsible for work organization is met by the distinctive concept of commissioning entity. This extends preventive duties considerably in favour of self-employed workers, particularly people involved in co-ordinated project work and of agency workers.

To such end, Article 26 of Legislative Decree no. 81/2008 generally identifies the 'commissioning entity' as the person who entrusts works to a contracting undertaking or to self-employed workers or who uses agency workers within his or her own business.[25]

For the purposes of extending these important responsibilities, the determining factor is therefore the fact that a person carries out a working activity on the 'commissioning entity's' premises. In such cases, as the Criminal Division of the *Corte di Cassazione* has confirmed,[26] it is the commissioning entity who must organize appropriate measures for guaranteeing the safety of workers not directly employed by him or her but operating within his or her business. This is when such measures are generic and not tied to the worker's specific activity.

A similar extension of the safety duty to those responsible for the business structure in which work is performed relates specifically to the building sector. Here, pursuant to Article 89(1)(b), the commissioning entity is identified as the party on whose behalf the whole work is being realized. This independently of possible sub-divisions of the work involved. In the case of public procurement, however, the commissioning entity is identified as the party vested with decision-making and spending power for the contract.

In such a context, the commissioning entity must therefore be identified as a physical person who will have duties carrying a criminal liability. In the case of public or private juristic persons, this person corresponds to the person authorized to sign procurement contracts for the execution of works.

25. F. Bacchini, 'Committenti e appaltatori', in *Il testo unico della salute e sicurezza nei luoghi di lavoro,* ed. M. Tiraboschi (Milan: Giuffrè, 2008),183 et seq.
26. So held the *Corte di Cassazione* (*Penale, IV Sezione*) in its Judgement no. 12348/2008.

§7.04 DUTIES OF THE PARTIES INVOLVED

[A] The Employer's Main Duty: Assess Risks to Workers' Safety and Health

Turning to consider the employer's safety duties more closely, ever since Legislative Decree no. 626/1994 (which specifically transposed the provisions of Article 6(3)(a) of the Framework Directive), the legislator has identified[27] the employer's principal, non-delegable duty to evaluate risks in the workplace as the cornerstone of a business's preventive system.[28]

Indeed, it is primarily through an emphasis on both the preventive assessment of all risks and the adoption of all the necessary collective protective measures (and, subordinately, the individual ones), that the concept of safety at work assumes a revolutionary dimension in comparison to the law previously in force at a Community and national level.

This insofar as the Community legislator clearly intended to abandon the idea that had characterized both the preceding legislative framework and subsequent Community legislation.[29] That is to say, the idea of protecting workplace safety by setting technical work standards.

A purely industrial and highly technical concept of safety at work has therefore been replaced by an a-technical acceptation of the safety of working conditions. In this way, it becomes possible to pass from the industrial perspective of workplace hygiene to one that seeks to guarantee occupational health and safety as a fundamental good.[30]

To such end, Article 4(1) of Legislative Decree no. 626/94 provided for a generalized duty on employers to assess all the risks potentially present in workplaces and not only those remaining after preventive and protective measures had been adopted. Thus not only the risks 'caused by work' but also those arising 'during work' counted as, indeed, they do now.

In the current legislative context, one of the strong points of the reform realized by Legislative Decree no. 81/2008 is the new formulation of the risk-assessment provisions.[31] In establishing the law on risk-assessment in Article 28, the legislator not

27. Not without difficulty, given that, in this respect the European Court of Justice, in its judgement in Case C-49/00, held the Italian State to be in breach of Art. 6 (3)(a) insofar as the initial formulation of Legislative Decree no. 626/1994 did not extend the risk-assessment duty to all the potential sources of harm to the health of workers present in the workplace.
28. See G. Natullo, *La tutela dell'ambiente di lavoro* (Turin: Utet, 1995); L. Galantino (ed.), *La sicurezza del lavoro* (Milan: Giuffrè, 1996); L. Montuschi (ed.), *Ambiente, salute e sicurezza,* (Turin: Giappichelli, 1998); M. Rusciano & G. Natullo (eds.), *Ambiente e sicurezza del lavoro*, (Turin: Utet, 2007); C. Smuraglia, 'Sicurezza del lavoro e obblighi comunitari. I ritardi dell'Italia nell'adempimento e le vie per uscirne', *Rivista italiana di diritto del lavoro*, no. 1 (2002): 221 et seq.
29. Which may be epitomized, by way of an example, in the provisions of Directive EEC/80/1107.
30. See J. Aparicio Tovar, 'Sicurezza sul lavoro', in *Dizionario di diritto del lavoro comunitario,* ed. A. Baylos Grau, B. Caruso, M. D'Antona & S. Sciarra (Bologna: Monduzzi, 1996), 568.
31. G. M. Monda, 'La valutazione dei rischi per la sicurezza e la salute dei lavoratori', in *Le nuove regole per la salute e la sicurezza dei lavoratori,* ed. L. Zoppoli, P. Pascucci & G. Natullo (Milan: Kluwer – Ipsoa, 2008), 336 et seq.

only expressly refers to technical risks deriving from production processes but also widens the employer's duty by referring to all the risks to workers' health and safety. These include, by way of example, those linked to work-related stress (in the light of the 'Framework Agreement on work-related stress', signed by the European social partners in October 2004), those regarding pregnant workers (in accordance with the provisions of Legislative Decree no. 151/2001) and those linked to gender differences, age and provenance from other countries.[32]

The provision has created not a few problems of interpretation. For the most part, these concern the assessment of risks associated with work-related stress and are caused by the lack of specific guidelines on how to carry out this type of assessment. Legislative Decree no. 106/2009 (correcting Legislative Decree no. 81/2008) sought to respond to these problems by attributing to a Permanent Advisory Committee the task of providing guidelines on methods of assessment. Nevertheless, serious difficulties in application persist, even following adoption of the guidelines dated 17 November 2010.

Article 28 of Legislative Decree no. 81/2008 is further distinguished by the greater detail in which the risk-assessment document's obligatory provisions must be expressed, as well as the fundamental requirements that the document be in written form and of certain date. In this way, it renders the employer's related duty far more meaningful. Indeed, the specificity of the law responds to a clearly perceived need to clarify the safety measures that the employer must adopt in order to eliminate the widespread practice (particularly amongst small and medium-sized enterprises) of carrying out a purely formal risk-assessment and considering the drafting of the risk-assessment document merely a bureaucratic duty.

Last but not least, it is appropriate to note how Article 28 also substantially affects the duty to revise and update the risk-assessment document.[33] To such end, the provision does not limit itself (as the previous law did) to providing that the assessment must be revised after changes to a business's production processes or work organization that are relevant to workers' health and safety. Clearly echoing the provisions of Article 2087 of the Civil Code, it also requires the revision to be carried out in relation to the extent to which technology, prevention and protection have evolved, as well as after significant accidents or when the results of health surveillance show the need. Furthermore, it is also necessary to update the preventive measures. Thus Article 28 makes the wide-ranging and evolutive nature of the employer's duty explicit, in line with Directive.

32. P. Pascucci, 'Dopo la legge n. 123 del 2007. Titolo I del d.lgs. 9 aprile 2008, n. 81 in materia di tutela della salute e della sicurezza nei luoghi di lavoro', http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DAntona/WP%20CSDLE%20M%20DAntona-IT/20111025-121117_pascucci_n73-2008itpdf.pdf > , vol. 73, 122 et seq.

33. P. Pascucci, 'Dopo la legge n. 123 del 2007. Titolo I del d.lgs. 9 aprile 2008, n. 81 in materia di tutela della salute e della sicurezza nei luoghi di lavoro', http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DAntona/WP%20CSDLE%20M%20DAntona-IT/20111025-121117_pascucci_n73-2008itpdf.pdf > , vol. 73, 122.

[B] The Entrepreneur and Management: The Delegation of Duties

The employer is the person with the general duty to ensure the safety of all his or her workers. As already pointed out, in the Italian legal order, this principle has its origins in Article 2087 of the Civil Code, by virtue of which an entrepreneur has a general duty to protect his or her workers' mental and physical integrity. Such rule can be read in two ways.[34] On the one hand, Article 2087 is the 'alpha' of all the legislation, since it has 'the function of permanently adapting the legal order to the underlying socio-economic reality'.[35] On the other, it may also be considered the legislative system's 'omega' provision, since it is the vehicle for filling possible lacunae and adapting the legislation to concrete, changing situations.[36]

This general principle creates a double duty for the employer: on the one hand, to adopt general measures protecting the mental and physical integrity of workers and, on the other, to manage risk prevention in the workplace.

Alongside such fundamental general provision, both the general and the specific employer's duties created by Legislative Decree no. 81/2008 are to be noted for their significantly analytical nature. In particular, Article 17 picks out the two fundamental duties that an employer cannot delegate to anyone else, namely, risk-assessment and appointment of the person responsible for the preventive and protective service. Article 18 then specifies in detail those general duties that an employer may share with his or her *alter ego* in the management of workplace safety, the manager.

In comparison with Legislative Decree no. 626/1994 (which previously regulated such profile), Article 18 of Legislative Decree 81/2008 eliminates references to the supervisor, whilst the law governing this figure's specific duties and tasks is set out separately in Article 19. This is justified by the wide range of provisions contained in Article 18, since these do not fit the figure of the supervisor as s/he is identified by Article 2(e) of Legislative Decree no. 81/2008. In this way, what has been defined as a contribution to simplification through the identification 'of the respective tasks and related responsibilities'[37] is guaranteed.

Pursuing this objective, the two provisions define the powers and responsibilities of the manager and the supervisor. The manager is the person who, within the limits of the hierarchical and functional powers vested in the mandate received, implements the employer's health and safety directions and monitors working activities. The supervisor, however, supervises working activities and guarantees implementation of

34. L. Montuschi, 'La sicurezza nei luoghi di lavoro ovvero l'arte del possibile', *Lavoro e diritto*, no. 2 (1995): 413 et seq.
35. As the *Corte di Cassazione* put it in its Judgement no. 5048/1988.
36. P. Pascucci, 'Dopo la legge n. 123 del 2007. Titolo I del d.lgs. 9 aprile 2008, n. 81 in materia di tutela della salute e della sicurezza nei luoghi di lavoro', http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DAntona/WP%20CSDLE%20M%20DAntona-IT/20111025-121117_pascucci_n73-2008itpdf.pdf > , vol. 73, 103 et seq.
37. P. Pascucci, 'Dopo la legge n. 123 del 2007. Titolo I del d.lgs. 9 aprile 2008, n. 81 in materia di tutela della salute e della sicurezza nei luoghi di lavoro', http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DAntona/WP%20CSDLE%20M%20DAntona-IT/20111025-121117_pascucci_n73-2008itpdf.pdf > , vol. 73,108.

the directions received, checking that they are carried out correctly.[38] It should further be noted that, prior to Legislative Decree no. 81/2008, no express statutory definition of supervisor existed. Such fact led to uncertainty about how the figure was to be identified and, consequently, about potential liability should the related legislation be breached.

The objective of actually, concretely dividing the tasks and responsibilities between the employer and his or her manager and supervisor, however, is achieved principally through the formal act of appointing such figures i.e., the so-called delegation of functions.

By its very nature, delegation can create problems. It can be difficult to identify the delegated person correctly and, more importantly, to divide responsibility between the same and the delegating party. Precisely for this reason, Articles 16 and 17 of Legislative Decree no. 81/2008 define the limits of delegation clearly.[39]

In the first place, as we have seen, Article 17 identifies the two activities that the entrepreneur is under a mandatory duty to carry out personally: risk-assessment and appointment of the person responsible for the preventive and protective service.

In the second place, Article 16 establishes the specific formal and substantive pre-requisites for valid delegation. In particular, the law provides that delegation must be effected through a clearly dated, written instrument that has been expressly accepted by the delegated person in writing. Likewise, it must establish specific subjective requirements: the delegated person must possess professional qualifications that are appropriate to exercise of the delegated authority. Furthermore, for the purposes of avoiding the creation of a so-called empty delegation, it must ensure that the delegated person receives the powers needed to exercise the delegated authority, including appropriate spending powers.

In closing, the law provides that delegation does not, of itself, exclude the employer's duty to ensure that the transferred duties are carried out correctly.

[C] The Role of Internalized and Externalized Preventive and Protective Services

As we have seen, the Italian health and safety system involves a variety of figures in the protection of workers' mental and physical integrity. Of those involved, the Preventive and Protective Service enjoys a role of primary importance.[40]

38. M. R. Gentile, 'I dirigenti e i preposti', in *Il testo unico della salute e sicurezza nei luoghi di lavoro,* ed. M. Tiraboschi (Milan: Giuffrè, 2008), 208 et seq.
39. P. Pascucci, 'Dopo la legge n. 123 del 2007. Titolo I del d.lgs. 9 aprile 2008, n. 81 in materia di tutela della salute e della sicurezza nei luoghi di lavoro', http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DAntona/WP%20CSDLE%20M%20DAntona-IT/20111025-121117_pascucci_n73-2008itpdf.pdf>, vol. 73,103 et seq.; A. Russo, 'La delega di funzioni e gli obblighi del datore di lavoro non delegabili', in *Il testo unico della salute e sicurezza nei luoghi di lavoro,* ed. M. Tiraboschi (Milan: Giuffrè, 2008), 217 et seq.
40. R. Bortone, 'Il servizio di prevenzione', in *Ambiente, salute e sicurezza,* ed. L. Montuschi (Turin: Giappichelli, 1998), 135 et seq.

The Service comprises a *Responsabile* (Person Responsible) and one or more *Addetti* (Officers). The professional pre-requisites for these figures are expressly indicated in the highly innovative Article 32 of Legislative Decree no. 81/2008. Both figures may be enlisted from either inside or outside the undertaking. More specifically, employers have a duty to enlist external persons when it is not possible to identify persons possessing the legally required qualifications within their own business. Furthermore, and irrespectively of such a situation, Article 31(6) of Legislative Decree no. 81/2008 identifies the circumstances in which the Preventive and Protective Service must be internal,[41] relating them to the hazardousness of the business's activity.[42]

Of the tasks assigned to the Service, that of identifying and assessing both the risk factors and the occupational health and safety measures assumes a particular importance. To such end, *Responsabile* and *Addetti* collaborate closely with the employer in the drafting of the risk-assessment document. Furthermore, it is the Preventive and Protective Service that formulates the safety procedures, proposes the workers' training and information programmes and provides workers with information about risks and the undertaking's safety system.

An undertaking's Preventive and Protective Service therefore ensures a series of transversal activities geared to co-ordinating the safety measures adopted by the employer with the real needs for prevention and protection in the workplace. It likewise participates in consultations on health and safety protection and prepares the documentation needed for continuous training on the undertaking's safety situations.

[D] The Training Duty

The principle of the division of competences in work-related health and safety management that informs the Framework Directive has, after some initial ambiguities in Legislative Decree no. 626/1994, been fully applied by the current law in Legislative Decree no. 81/2008.

This provides that workers' involvement is to be achieved not only by informing and consulting the workers' representatives and the workers themselves but also through the employer's fundamental duty to train his or her own employees.[43]

41. P. Pascucci, 'Dopo la legge n. 123 del 2007. Titolo I del d.lgs. 9 aprile 2008, n. 81 in materia di tutela della salute e della sicurezza nei luoghi di lavoro', http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DAntona/WP%20CSDLE%20M%20DAntona-IT/20111025-121117_pascucci_n73-2008itpdf.pdf > , vol. 73, 128 et seq.
42. For example: (a) in industrial businesses covered by Article 2 of Legislative Decree no. 334/1999 that have a duty to issue notifications or reports pursuant to Articles 6 and 8 of the same decree; (b) in thermoelectric power plants; (c) in plants and installations covered by Articles 7, 28 and 33 of Legislative Decree no. 230/1995; (d) in businesses involved in the manufacture and separate storage of explosives, gunpowder and munitions; (e) in industrial businesses with over 200 workers; (f) in mining industries with over fifty workers and (g) in public and private health-care structures with more than fifty workers.
43. O. Di Monte, 'L'informazione e la formazione dei lavoratori', in *La sicurezza sul lavoro*, ed. M. Ricci (Bari: Cacucci, 1999), 169 et seq.

Indeed, the prevention of accidents at work requires knowledge and awareness of the risks. To such end, the duty to train workers is amply covered by Articles 36 and 37 of Legislative Decree no. 81/2008, which include a reference to practical training geared to teaching the worker 'the correct use of apparatus, machines, plant, substances and equipment, including personal protective equipment, as well as the working procedures' (Article 37(4) and (5)).

The new national regulatory framework is also to be noted for how it defines the concept of 'training'. Indeed, under Article 2(1)(aa) of Legislative Decree no. 81/2008, the latter is understood as the:

> instructive process through which the knowledge and procedures that aid both the acquisition of competences for safely carrying out their respective tasks within the undertaking and the identification, reduction and management of risks are to be transferred to workers and the other parties in the undertaking's prevention and protection system.

In the said context, training therefore constitutes one of the most important general measures for protecting workers.[44] More specifically, the employer must guarantee not only that the training occurs but also that it is realized using the means that are most appropriate for getting through to the trainees. Indeed, entrepreneurs are under a general duty to ensure results i.e., to check that the trainees have assimilated the concepts.[45] To such end, Article 37 of Legislative Decree no. 81/2008 requires the employer to ensure that each worker receives a sufficient and appropriate training in health and safety, including with regard to his or her linguistic abilities.

In this light, the provision in Article 37(13) of Legislative Decree no. 81/2008 assumes a particular importance. Referring to immigrant workers, it states 'where training concerns immigrant workers, it shall take place after prior verification of the understanding and knowledge of the vehicular language used in the training programme'.[46]

In addition to requiring the employer to make sure that each worker receives sufficient and appropriate health and safety training, Article 37 of Legislative Decree no. 81/2008 makes the content of the training explicit. In particular, training must refer to: (a) the concepts of risk, harm, prevention, protection and organization of the undertaking's prevention, as well as rights and duties attaching to the various figures within the undertaking and the bodies responsible for supervision, inspection and assistance; (b) the risks attaching to individual tasks and the possible forms of harm,

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44. The case law is in agreement, holding that the employer may discharge his or her duties to provide information and training through competent third parties and/or through figures that will typically contribute to protecting safety at work. In this sense, see *Corte di Cassazione* (*Penale, III sezione*), Judgement no. 41609/2006, in *Igiene e sicurezza del lavoro,* no. 2 (2007): 104 et seq.
45. M. Lai, *La sicurezza del lavoro tra legge e contrattazione collettiva* (Turin: Giappichelli, 2002), 201 et seq.; L. Miranda, *La dimensión colectiva de la tutela del entorno de trabajo en Europa: perfiles comparativos entre Italia, Francia y Eslovenia* (Albacete: Bomarzo, 2012), 165 et seq.
46. A similar provision is contained in Article 36(4), with reference to information, according to which, 'Where the provision of information concerns immigrant workers, it shall take place after prior verification of the understanding and knowledge of the language used in the information process.'

as well as the attendant preventive and protective measures and procedures that are characteristic of the sector or sub-sector to which the business belongs.[47] Furthermore, training must be provided during working hours and may not be at the workers' expense.

The legislator further specifies when the employer must discharge his or her training duty. The relevant moments are: upon recruitment, in the event of a transfer or a change of job and in the event of the introduction of new work equipment, any new technology or new hazardous substances or preparations. Thus the dynamic nature of the training duty may be inferred. It is not discharged in any one given moment but 'shadows' the changes characterizing not just individuals' work but the whole production process. Indeed, pursuant to Article 37(6) of Legislative Decree no. 81/2008, training must be re-proposed as risks evolve or as new risks arise.[48]

It is likewise appropriate to observe that if the main beneficiary of the information and training duty is doubtless the worker, the same reasoning must be applied to all parties involved in protecting health and safety in the workplace. Thus the workers' safety representatives, the managers, the persons in charge and the persons responsible for the Preventive and Protective Service must all receive detailed information and training that is specific to their roles.

The training of workers' safety representatives is accorded particular importance by Article 37(10) of Legislative Decree no. 81/2008. Such training is seen as the means of ensuring the necessary competences for exercising the powers to check health and safety that are proper to the role. Representatives must have such techno-cultural qualities and general training as allow a real exchange of information and fully conscious, preventive and timely consultation regarding the management of work safety. More generally, training must make the conscious participation of workers' specialist representatives possible. It therefore assumes a function that is closely linked to the establishment of important rights concerning information and consultation and constituting the 'balanced participation' referred to in Framework Directive.

As regards the other parties who are to receive training, Legislative Decree no. 81/2008 provides for special training for the workers given responsibility for fire prevention, fire-fighting, evacuation from the workplace in the event of serious and imminent danger, rescue work, first aid and the management of emergencies.

Furthermore, one of the novelties of Legislative Decree no. 81/2008 is its provision of an appropriate, specific training for supervisors (Article 37(7)). Furthermore, pursuant to Article 15, such figures have the right to receive the information and training that are appropriate to one of the primary roles in health and safety protection.[49]

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47. P. Pascucci, 'Dopo la legge n. 123 del 2007. Titolo I del d.lgs. 9 aprile 2008, n. 81 in materia di tutela della salute e della sicurezza nei luoghi di lavoro', http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DAntona/WP%20CSDLE%20M%20DAntona-IT/20111025-121117_pascucci_n73-2008itpdf.pdf > , vol. 73, 132.
48. L. Carollo, 'Informazione e formazione dei lavoratori', in *Il testo unico della salute e sicurezza nei luoghi di lavoro,* ed. M. Tiraboschi (Milan: Giuffrè, 2008), 493 et seq.
49. M. R. Gentile, 'I dirigenti e i preposti', in *Il testo unico della salute e sicurezza nei luoghi di lavoro,* ed. M. Tiraboschi (Milan: Giuffrè, 2008), 215.

Indeed, the numerous functions attributed to the health and safety supervisor demand that such figure be given an adequate training. In particular, the training must allow the supervisor to operate independently when applying the preventive and protective measures that have been prepared by the employer and manager.

Analogously with the supervisor, the manager has the right to receive training that is appropriate to his or her role in the undertaking and in relation to application of the accident-prevention rules.

Lastly, the persons responsible for the Preventive and Protective Service also fall within the employer's training duty.[50] It should be noted that Legislative Decree no. 81/2008 does not contain any particular novelties in this area, if compared to the previous legislation. Thus, in addition to the general training courses, these persons must attend specific courses on the prevention of and protection from risks (including ergonomic risks), the organization and management of technical-administrative activities, business communication techniques and industrial relations. The real novelty lies in the duty on persons responsible for the Preventive and Protective Service to attend training courses on the risks deriving from work-related stress: pursuant to Article 28 of Legislative Decree no. 81/2008, employers have to take account of these risks when drawing up the risk-assessment document.

[E] Duties on Contractors and Sub-contractors, with Specific Reference to the Building Sector

It has already been observed how, by virtue of the broad concept of commissioning entity as defined by Article 26 of Legislative Decree no. 81/2008, those who entrust works to contracting undertakings or to self-employed workers or who use agency workers within their undertakings are considered by the current national legislation to fall within the definition. These very different categories are therefore united by the respective duties accorded them by the health and safety law.

Such a decision is based on the undisputed fact that workers' safety can be even more precarious in cases where, through the award of contracts, the activities of other undertakings or self-employed workers become an inextricable part of an employer's production organization. Indeed, in this way, to the normal risks of the workplace are added new ones deriving from reciprocal interference with the various activities.[51]

Precisely by virtue of this fact, commissioning entities have duties to supervise, co-ordinate and co-operate with the parties to whom they entrust works. In particular and as already observed, the commissioning entity's fundamental duty is to draw up a

50. P. De Vita, 'Formazione dei lavoratori e dei responsabili/addetti', in *Il testo unico della salute e sicurezza nei luoghi di lavoro,* ed. M. Tiraboschi (Milan: Giuffrè, 2008), 495 et seq.

51. See P. Pascucci, 'Dopo la legge n. 123 del 2007. Titolo I del d.lgs. 9 aprile 2008, n. 81 in materia di tutela della salute e della sicurezza nei luoghi di lavoro', http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DAntona/WP%20CSDLE%20M%20DAntona-IT/20111025-121117
_pascucci_n73-2008itpdf.pdf > , vol. 73, 112 et seq.

consolidated risk-assessment document, which must be attached to procurement contracts or contracts for personal professional services.

It is clear that such a provision acquires particular importance in certain working contexts where the risk deriving from interference not only is more probable but will also have a greater impact on workers' health and safety. This is particularly the case in the building sector, which is characterized by the considerable recourse it has to procurement contracts and contracts for personal professional services.

In the light of the above, it may be helpful to analyse one of the commissioning entity's fundamental duties, namely, the duty to appoint safety co-ordinators. Article 90(3) of Legislative Decree no. 81/2008 establishes, in relation to temporary and mobile worksites, the cases in which the commissioning entity is under a duty to designate co-ordinators during planning and during execution of the works. Under the previous legislative framework, appointment of such figures was required solely in cases where more than one undertaking was present on-site (not necessarily contemporaneously) or in cases where the magnitude of the project was equal to or greater than 200 man-days, or in the case of projects below that threshold but presenting particular risks for workers' health and safety, of the types indicated in Annexe II to Legislative Decree no. 494/1996.

In contrast, the new provision establishes the commissioning entity's duty to appoint safety co-ordinators in the case where the (not necessarily contemporaneous) presence of more than one undertaking is envisaged. The further condition linked to the magnitude of the project or the more hazardous nature of the activity is therefore no longer relevant.

Section 11 of the same Article 90 provided for a specific derogation from such provision in the case of those private works that do not require a building permit but have to present a simple 'declaration of an activity's commencement' (the so-called DIA – *Dichiarazione di Inizio Attività*). In its judgment dated 7 October 2010 in case no. C-224/09, the Court of Justice of the European Union found against the Republic of Italy on this point, for having exempted commissioning entities from the duty to appoint safety co-ordinators for the planning stage, in breach of Article 3(1) of Directive 92/57/EEC.

The commissioning entity's duties are also important as far as checking is concerned. In addition to checking the technical/professional suitability of both the undertakings and the self-employed workers entrusted with the works, it must also require the undertakings carrying out the works to supply a declaration regarding the average annual number of staff, classified according to qualifications. Such declaration must be accompanied by the details contained in the declarations made by workers to the National Social Security Institute (INPS – *Istituto nazionale della previdenza nazionale*), the National Occupational Accident Insurance Institute (INAIL – *Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro*) and the *casse edili* (bilateral bodies established by collective agreements), as well as a declaration regarding the collective agreement stipulated by the comparatively most representative Trade Unions, applied to the employed workers. Before the works commence, the

commissioning entity is likewise required to send the names of the undertakings executing the works and the documentation acquired from them to the competent public authority. In the absence of the said documentation, the undertaking's activity is suspended.

[F] Workers' Duties

As stated earlier, the Italian legal order has also embraced a broad concept of 'worker'. So broad that it includes employees, self-employed and those involved in co-ordinated project work. This all-inclusive concept results in an extension of the related health and safety duties to all workers, regardless of the type of contract they have.

In connection with these duties, it should first be observed that the Italian framework, in line with the Community legislation, is based on the two fundamental principles of employer's liability and workers' involvement.

In the light of the latter, the idea of a worker who not only has health and safety rights but also specific duties is enunciated, with the aim of spreading that 'safety culture' that is the bedrock of the current national legislation.

Thus workers have become an active part of the prevention system, since they are under a duty to take care of their own health and safety, as well as that of all the people who may be affected by their actions or omissions at work. Indeed, people have come to talk of 'the worker's safety duty towards him or herself'. This would have its origins in Article 32 of the Constitution, in its assertion of the individual's right to have his or her health protected.[52]

It should nevertheless be observed that workers' involvement does not in any way limit the principle of employers' liability as expressly established both by Legislative Decree no. 626/1994 and by Legislative Decree no. 81/2008.[53] In truth, the legislator's intention was not to extend the employer's duties to workers but, rather, to increase the latter's awareness of their own role within the prevention system, thereby avoiding those negligent attitudes that workers all too often have, particularly regarding the use of personal protective equipment.[54] Workers therefore have the duty, amongst others, to respect the safety provisions established by employers or commissioning entities.

§7.05 COMPLIANCE AND CONTROL

One of the most controversial aspects of the law governing health and safety in the Italian legal order is the role it accords the inspection and monitoring bodies.[55]

52. S. P. Emiliani, 'Il dovere di sicurezza del lavoratore verso se stesso alla luce della normativa comunitaria', *Argomenti di diritto del lavoro*, no. 1 (2009): 104 et seq.
53. See M. Corrias, *Sicurezza e obblighi del lavoratore* (Turin: Giappichelli, 2008), 71.
54. A. Pinna, 'Obblighi, compiti e diritti dei lavoratori', in *La tutela della salute nei luoghi di lavoro*, ed. G. Loy (Padua: Cedam, 1996), 32 et seq.
55. P. Rausei, 'Le contravvenzioni e le sanzioni amministrative', in *Il testo unico della salute e sicurezza nei luoghi di lavoro,* ed. M. Tiraboschi (Milan: Giuffrè, 2008), 729 et seq.

At present, pursuant to Article 13 of Legislative Decree no. 81/2008, observance of the work safety rules is monitored by the Local Health Authorities (*Aziende sanitarie locali* – hereinafter also 'ASL'), each one exercising jurisdiction in its own territory; by the national Fire Brigade, in relation to its own specific jurisdiction; by the Ministry of Economic Development, in relation to the mining sector (until the latter jurisdiction is effectively transferred, pursuant to Legislative Decree no. 300, dated 30 July 1999, as subsequently amended) and by the Regions and autonomous provinces of Trento and Bolzano, as regards the secondary mining industries and both mineral and thermal waters.

In workplaces managed by the Armed Forces, the Police Forces and the Fire Brigade, monitoring of the application of the occupational health and safety legislation is carried out exclusively by health services and technical services set up within the said organizations i.e., by structures within the same authority.

It should be added at this point that, as regards matters either directly or indirectly linked to the protection of workplace safety (such as the subject of working time, for example), such bodies are flanked by inspectors at the Ministry of Labour and Social Policies (Labour inspectors) who have both a general jurisdiction and the fundamental task of co-ordinating jurisdictions and/or functions when these overlap with those of other inspectorates.

Labour inspectors monitor the application of the health and safety provisions in the following areas of activity: construction and civil engineering; works using caissons in compressed air conditions and underwater works, and those other work activities carrying particularly high risks that have been identified by decrees of the President of the Council of Ministers.

It is therefore evident that the institutional system for the national, labour law monitoring of occupational health and safety involves different parties with basically different inspection duties that sometimes overlap.

Against this particularly complex, articulated backdrop, the powers attributed to individual administrative inspection and monitoring bodies for the purposes of facilitating undertakings' compliance with legal obligations stand out in sharp relief.

In an occupational health and safety context, such function is carried out through three fundamentally important legal tools that turn to account the role of the administrative inspection bodies that is geared to fostering the re-establishment of lawful situations, rather than exclusively punishing infringements.

Such tools are the *interpello* (formal query), governed, generally, by Article 9 of Legislative Decree no. 124/2004, as amended by Decree Law no. 262/2006 and, as regards occupational health and safety, by Article 12 of Legislative Decree no. 81/2008; the *prescrizione* (prescribing notice), which is governed by Article 20 of Legislative Decree no. 758/1994 – to which Article 301 of Legislative Decree no. 81/2008 specifically refers with regard to the protection of workplace safety – and which provides for the concessional extinguishment of administrative offences following regularization (governed, in its turn, by Article 301*bis* of Legislative Decree no. 81/2008, as introduced by Article 143(1) of Legislative Decree no. 106, dated 3 August 2009) and, last but not least, the power to issue provisions (governed by Article 302*bis*

of Legislative Decree no. 81/2008, as introduced by Article 144(2) of Legislative Decree no. 106, dated 3 August 2009).

In pride of place stands the *interpello* regarding matters of occupational health and safety, which has only been fully realized during the last few months. Constituting one of the main novelties introduced by Legislative Decree no. 81/2008, this permits the associative bodies of the local authorities, the trade unions and the most representative employers' organizations at a national level, as well as the professions' national councils, to send queries of a general nature regarding application of the occupational health and safety legislation to a special '*Interpello* Committee' established at the Ministry of Labour by way of a Ministerial Decree dated 28 September 2011 (issued pursuant to Article 12(2) of Legislative Decree no. 81/2008).

When it receives questions of a general nature regarding workplace safety, the '*Interpello* Committee' answers them, issuing directions that are binding on the majority of undertakings operating in the national territory. Such directions also constitute interpretative and executive guidelines for the competent monitoring bodies when carrying out their activities.

In this respect, the tool of the 'safety' *interpello* differs from the same-named 'ordinary' *interpello* (governed, regarding other work and social security issues generally, by Article 9 of Legislative Decree no. 124/2004, as amended by Decree Law no. 262/2006) whereby an undertaking's compliance with the reply from the Inspectorate's Head Office to an 'ordinary' *interpello* precludes the applicability of the prescribed civil, criminal and administrative penalties.

The difference is fully justified by the constitutionally protected nature of the matters that are the object of the 'safety *interpello*', as well as by the impossibility of defining a priori the adequacy of the workplace safety measures adopted. This partly in relation to the position of guarantor that the employer has towards his or her own employees, which, by virtue of the constantly dynamic conditions in the workplace and as constantly stated by the case law, persists even when the monitoring inspections have been passed.

Thus *interpelli* regarding workplace safety have a far more limited effect than their more general counterparts. Such fact does not diminish their usefulness, however. This is especially so when they raise issues of a formal nature, as in the cases regarding the reporting of occupational diseases (*Interpello* no. 5/2009, dated 06 February 2009) and delivery of the risk evaluation document (*Interpello* no. 58/2008, dated 19 December 2008).

In a perspective similar to that of the *interpello* (since it, too, is chiefly directed at guaranteeing the re-establishment of legality within businesses), the tool of the *prescrizione* (prescribing notice) has been grafted onto the national preventive system. It is governed by Articles 20 et seq. of Legislative Decree no. 758/1994, as specifically referred to – regarding the protection of workplace safety – by Article 310 of Legislative Decree no. 81/2008 (amended by Article 142(1) of Legislative Decree no. 106, dated 3 August 2009, confirming the tool's value insofar as it relates to workplace safety).

In cases where a breach of workplace safety provisions has been ascertained by the competent supervisory inspection bodies, a *prescrizione* allows the enterprise a concessional extinguishment of those offences that are punished with alternative

penalties of imprisonment or a fine, or with just a fine, once it has re-established a lawful situation by complying with the directions issued by the administrative monitoring bodies.

More specifically, pursuant to Article 20 of Legislative Decree no. 758/1994, the administrative monitoring body with specific competence that ascertains a breach of the law when carrying out its judicial police functions, is called to communicate a crime report to the Public Prosecutions Office, pursuant to Article 347 of the Code of Criminal Procedure, and subsequently send the enterprise a detailed 'performance notice' prescribing the performance of specific actions, whilst fixing a deadline for its implementation. This for the purposes of reconciling the need to re-establish lawful business safety conditions, on the one hand, with the need to impose a penalty through the payment (on concessional terms) of the established fine, on the other.

When compliance with the duties is particularly complex or objectively difficult, the timeframe granted to the enterprise may, pursuant to Article 20(1) of Legislative Decree no. 758/1994, be extended at the offender's request. That said, the time extension cannot in any circumstances exceed six months, except where specific circumstances not imputable to the offender cause an objective delay in the regularization. In such a case, at the offender's request, an extension may be permitted just once, for a period of no longer than another six months. It is granted by way of an administrative measure that includes a statement of reasons, which measure is immediately communicated to the Public Prosecutions Office.

Pursuant to Article 21 of Legislative Decree no. 758/1994, the monitoring bodies are then required to verify whether the breach has been eliminated according to the specifications and within the timeframe indicated in the 'prescribing notice'. This must be done within sixty days of expiry of the deadline established by the *prescrizione*.

When the assessment is positive, the offender will be permitted to pay the related fine, reduced to an amount equal to one-quarter of the maximum statutory fine for the infringement committed, within thirty days. At the same time and within 120 days of expiry of the timeframe fixed in the *prescrizione*, the monitoring body communicates both the fact of compliance with the latter and the payment of the fine to the Public Prosecutions Office. Pursuant to Article 24(1) of Legislative Decree no. 758/1994, these together result in the infringement's extinguishment and the consequential dismissal of the criminal proceedings at the public prosecutor's request.

Late compliance will allow relief from the penalties applicable to the offender, even if it is achieved in a manner other than that indicated by the monitoring body, provided that it is adequate (according to the meaning attributed to the term through reference to the criterion set out in Article 20(1) of Legislative Decree no. 758/1994 i.e., the elimination of the harmful or dangerous consequences ascertained). This by virtue of the provisions contained in Article 162*bis* of the Criminal Code, concerning the payment of fines. In such a case, the sum to be paid is reduced to one-quarter of the maximum fine established for the offence committed.

Should the administrative monitoring body ascertain a persisting failure to comply with the *prescrizione*, however, then pursuant to Article 21(3) of Legislative Decree no. 758/1994, it communicates such fact both to the Public Prosecutions Office

and to the offender within ninety days of expiry of the timeframe in the 'prescribing notice'. As a consequence, the legally established penalties will be applied to the offender in their entirety.

The issue of whether the provisions governing powers to issue notices (identified by Article 9 of Presidential Decree no. 520, dated 19 March 1955, and Article 13 of Legislative Decree no. 124/2004) could be extended – in favour of the inspectors working at the Provincial Labour Offices – to those breaches of prevention law punished as administrative offences, proved far more problematic (partly as a result of the enactment of Legislative Decree no. 81/2008).

Indeed, notices constitute one of the essential tools for guaranteeing the right balance between the need to re-establish lawful situations and the punitive function of the penalties system. This they achieve by offering the extinguishment of the administrative offence through the payment of a sum equal to the minimum penalty, after regularization of the ascertained breach within the timeframe indicated in the minutes of the first inspection.

That the tools may be extended to the prevention rules falling within the jurisdiction of the Ministry of Labour's 'administrative monitoring' bodies was subsequently made clear by Circular no. 9, dated 23 March 2006. This provided that, 'there being no limitation whatsoever in this respect, the power to issue notices applies to all matters falling within the jurisdiction of the labour inspectors and, therefore, also to matters – such as workplace safety, in particular – where there exist residual State assessment powers'.

Despite the power of the Provincial Labour Offices' inspection bodies to issue notices regarding preventive matters, no similar power had been legally established in favour of the ASL's inspection bodies, even after Legislative Decree no. 81/2008 had been enacted.

It was only with the insertion of Article 301*bis* into the text of Legislative Decree no. 81/2008 (effected by Article 143(1) of Legislative Decree no. 106, dated 3 August 2009) that the problem of the notice tool's applicability to preventive matters was solved.

Indeed, by inserting an instrument totally analogous with the abovementioned notice, Article 301*bis* of Legislative Decree no. 81/2008 introduces the tool of the so-called concessionary extinguishment of administrative offences following regularization, by virtue of which, 'in all cases of non-compliance with the [preventive – Ed.] duties punished with an administrative fine', the offender is allowed to pay a reduced amount equal to the minimum provided for by law, if s/he regularizes the position within the deadline set in the minutes of the first inspection access.

In fact, following the rule's insertion into Legislative Decree no. 81/2008, one can witness the institution of a special 'preventive notice' that is applicable solely and exclusively to breaches regarding workplace safety that are punished with administrative fines.

On the one hand, the rule solves the problem of the ASL's lack of powers in this area by extending the tool's application to all the monitoring bodies with competence for preventive matters. On the other and in a purely simplifying manner, it introduces a new instrument that, whilst following the implementation specifications contained in

Article 13 of Legislative Decree no. 124/2004, potentially guarantees the special nature of the workplace safety provisions. This is consistent with the aim of focussing on the effectiveness of a punitive reaction centred not so much on fining breaches as on re-establishing lawful conditions (the aim that had already inspired Parent Act no. 123/2007).

Lastly, as far as inspectors' compliance tools are concerned, brief mention must be made of another tool grafted onto the system through Article 302*bis* of Legislative Decree no. 81/2008 (via Article 144(2) of Legislative Decree no. 106, dated 3 August 2009). This is the provision-issuing power attributed to the workplace safety inspection bodies regarding the application of technical rules and good practices where the latter are voluntarily adopted by employers.

The legislation accords the supervisory inspection bodies the power to issue executive orders ensuring the application of technical rules and good practices in cases where the latter have been voluntarily adopted by employers and are expressly referred to by the same during an inspection, should the monitoring bodies find that such rules and good practices have not been put into practice correctly. Failure to comply with an order results in application of the legally established penalties, in those cases where a breach has clearly occurred.

Owing to the voluntary nature of technical rules and good practices, the law also envisages a mechanism for appealing against executive orders within thirty days of their issue. Appeals are made to the relevant authority with immediate hierarchical superiority, which authority decides the appeal within fifteen days.

§7.06 WORKERS REPRESENTATIVES

[A] The Role of Workers' Representatives in the Management of Occupational Health and Safety

The Italian legal order has always accorded workers' general representatives a primary role in the management of undertakings' preventive systems. They flank and sometimes overlap with the representatives accorded specific responsibility by the health and safety legislation.

In this context, it should be noted that the national model of representation is characterized by a single channel system through which the collective protection of workers is exclusively entrusted to the trade unions, to which both participation and negotiating powers are devolved.[56]

The powers of collective bargaining with undertakings are therefore attributed to the trade unions' representative bodies within such undertakings. In the context of safety at work, however, these powers are subject to obvious limitations created by the very real risk that bargaining about preventive measures could lead to what is referred

56. See, L. Miranda, *La dimensión colectiva de la tutela del entorno de trabajo en Europa: perfiles comparativos entre Italia, Francia y Eslovenia* (Albacete: Bomarzo, 2012), 104 et seq.

to as the 'monetization of safety'[57] i.e., that the parties may agree to a qualitative reduction of workplace safety standards in exchange for contractual concessions.[58]

For this reason, occupational health and safety in general and work hygiene and safety conditions, in particular, are non-negotiable issues in the collective bargaining context.[59] Such fact does not mean, however, that collective bargaining never concerns matters closely related to occupational health and safety. It plays a primary part in managing working conditions whenever there is a need to regulate specific issues linked to work organization.[60]

As a consequence, collective bargaining at every level may only implement the safety standards established by law. Although it has a primary role, influencing occupational health and safety both directly and indirectly every time it concerns itself with work organization (particularly the management of working time), it has different aims from the participatory one provided for by the Framework Directive. This insofar as it presupposes a natural conflict of the parties' interests, which finds its settlement in the agreement that is negotiated.

It is onto this complex structure that the first collectively representative figure was grafted in the 1970s. Defined by Article 9 of Law no. 300/70 (the so-called Workers' Statute), this figure has duties to protect working conditions.[61] More specifically, under the rubric 'protection of health and physical integrity' and disregarding how the representative bodies it refers to are legally established, Article 9 provides that:

> Workers, through their representatives, have the right both to check that the rules for preventing accidents and occupational diseases are applied and to promote research into and the development and implementation of all the appropriate measures for protecting their health and physical integrity.

The 'total functional overlapping' of 'their representatives' with the workers' safety representatives created by the recent legislation results in the 'Article 9 representatives'

57. See, G. Balandi, 'Individuale e collettivo nella tutela della salute nei luoghi di lavoro: l'art. 9 dello Statuto', *Lavoro e Diritto,* no. 1 (1990): 222 et seq.; C. Zoli, 'Sicurezza del lavoro: contrattazione e partecipazione', *Rivista Giuridica del Lavoro*, no. 3 (2000): 624 et seq.; A. Lo Faro, 'Azione collettiva e tutela dell'ambiente di lavoro in Europa', *Giornale di diritto del lavoro e di relazioni industriali*, no. 1 (1991): 162 et seq.; M. Ricci, 'Sicurezza sul lavoro: controllo e partecipazione sindacale tra iure condito e de iure condendo', *Il lavoro nella giurisprudenza,* no. 2 (2008): 113 et seq.
58. L. Montuschi, 'Verso il testo unico sulla sicurezza del lavoro', *Giornale di diritto del lavoro e di relazioni industriali*, no. 2 (2007): 799 et seq.
59. G. Balandi, 'Individuale e collettivo nella tutela della salute nei luoghi di lavoro: l'art. 9 dello Statuto', *Lavoro e Diritto,* no. 1 (1990): 222.
60. See, L. Miranda, 'Organizzazione del lavoro e sicurezza negli accordi del Gruppo Fiat-Chrysler. Verso un comune modello di rappresentanza paritetica per la sicurezza?', *Diritti lavori mercati*, no. 1 (2012): 93 – 113.
61. G. Ghezzi, 'Art. 9 (Tutela della salute e dell'integrità fisica)', in *Statuto dei diritti dei lavoratori. Art. 1-13,* ed. U. Romagnoli et al. (Bologna: Zanichelli, 1979), 2nd ed.; U. Prosperetti, 'Commentary on the Judgement issued by the Milanese Pretura, 28 July 1971', *Massimario di giurisprudenza del lavoro,* no. 1 (1972): 20; E. Ales, 'L'articolo 9 statuto dei lavoratori alla luce della legislazione più recente in materia di salute e sicurezza: Partecipazione o controllo?', *Rivista italiana di diritto del lavoro*, no. 1 (2011): 57 et seq.; P. Pascucci, 'Salute e sicurezza: dalle rappresentanze dell'art. 9 ai rappresentanti del d.lgs. 81/08', *Diritti lavori mercati*, no. 4 (2010): 670 et seq.

being subjectively identified with the more recent ones. If, on the one hand, such fact 'legitimises the suspicion that Article 9 of the Workers' Statute no longer has any reason to continue existing',[62] on the other, it reinforces the exercise of the rights recognized by Article 9 – through the development of instrumental employers' duties such as those relating to information, training, consultation and participation for workers and their representatives.[63]

In the existing framework, therefore, the rights recognized by Article 9 of Act no. 300/1970 integrate and complete the collective workplace safety toolkit attributed to the technical-specialist representatives identified by Legislative Decree no. 81/2008.

Deferring an analysis of the specialist representatives' powers to the following Article, it is appropriate here and now briefly to mention how the representatives' checking power contained in Article 9 has been made consistent with the power to verify contained previously in the 1994 law and now in the 2008 legislation. As regards the power's scope, it may be emphasized that assessment of all the threats to workers' health and safety (including those involving groups of workers exposed to particular risks) is, as we have seen, now explicitly relevant to the monitoring of the health and safety measures' application and not just as the result of an (albeit sustainable) extensive interpretation of Article 2087 of the Civil Code.[64] In this respect, 'particular risks' include those linked to work-related stress (in accordance with the provisions of the European Framework Agreement dated 8 October 2004), those involving female workers during pregnancy (in accordance with the provisions of Legislative Decree no. 151/2001), those linked to differences in gender, age and provenance from other countries and those linked to the specific type of contract under which the work is carried out (Article 28(1)).

If to this are added all the considerations regarding the new definition of workers' health as a 'state of complete physical, mental and social well-being and not merely the absence of disease and infirmity' (Article 2(1)(o)), it may be said that the workers' power to check and report through their safety representatives (hereinafter also WSR) to an undertaking's management and, in the case of its inertia, to the competent bodies, extends well beyond the traditional concept of psycho-physical integrity contained in Article 9. Indeed, it extends to the risks linked to work-related stress and also (and perhaps primarily) to those attaching to differences in gender, age, nationality and type of contract, in relation to which frequent (and often fruitless) efforts have been made to identify a distinguishing characteristic.[65]

In this perspective, to the dimension just mentioned must be added another, concerning the threat to the health and safety of female and male workers deriving

62. G. Perone, *Lo statuto dei Lavoratori* (Turin: UTET, 1997), 89.
63. E. Ales, 'L'articolo 9 statuto dei lavoratori alla luce della legislazione più recente in materia di salute e sicurezza: Partecipazione o controllo?', *Rivista italiana di diritto del lavoro*, no. 1 (2011): 57.
64. L. Montuschi, *Diritto alla salute e organizzazione del lavoro* (Milan: Giuffrè, 1980), 157 et seq.
65. E. Ales, 'L'articolo 9 statuto dei lavoratori alla luce della legislazione più recente in materia di salute e sicurezza: Partecipazione o controllo?', *Rivista italiana di diritto del lavoro*, no. 1 (2011): 57

from discriminatory behaviour or actions (including harassment, obviously[66]) on the part of employers, managers, supervisors or workers' own colleagues.[67] This includes behaviour or actions based on discriminatory motives other than those expressly referred to by Article 28(1), by virtue of the reference made there to 'all the risks for workers' health and safety'.

In the new regulatory framework, therefore, extension of the WSRs' monitoring power provides a solution to the problems linked to the only potential existence (in the private sector) of equal opportunities bodies that may serve to identify and report discrimination.

[B] The Italian Path to Balanced Participation and the Compulsory Establishment of a Workers' Representative Body for Health and Safety at Work

In implementation of the Framework Directive, the national legislator has established a distinctive representative body with specific occupational health and safety duties: the Workers' Safety Representative, to be entrusted with the tasks outlined by the Community legislator.[68]

There can be no doubt that one of the most important novelties introduced by Legislative Decree no. 81/2008 is its new formulation of the rules on workers' collective representation.[69] These are set out in section VII (entitled 'Consultation and Participation of Workers' Representatives') and contain some directions that show the legislator's clearly intentional emphasis on the necessity for and mandatory nature of the representation in question.

Article 47 of Legislative Decree no. 81/2008 makes such provision, breaking with the line pursued in Article 18 of Legislative Decree no. 626/94. This discontinuity is

66. See Judgement *Corte di Cassazione (Penale, III Sezione),* no. 12738/2008. This recognized the *locus standi* of a trade union (of which a female worker who had been the victim of sexual violence was a member) to bring a civil claim within the criminal proceedings, on the assumption that Legislative Decree no. 626/1994 extended the concept of health to include not only physical but also psychic integrity.
67. P. Albi, *Adempimento dell'obbligo di sicurezza e tutela della persona. Art. 2087 c.c.,* Vol. of *Il Codice Civile. Commentario. Fondato da P. Schlesinger,* ed. F.D. Busnelli (Milan: Giuffré, 2008), 305 et seq.; A. Lassandari, *Le discriminazioni nel lavoro. Nozioni, interessi, tutele*, Vol. LVI of *Trattato di Diritto Commerciale e di Diritto Pubblico dell'Economia,* ed. F. Galgano (Padua: Cedam, 2010).
68. L. Galantino, 'Il contenuto dell'obbligo di sicurezza', in *La sicurezza del lavoro,* ed. L. Galantino (Milan: Giuffrè, 1996), 8; G. Natullo, *La tutela dell'ambiente di lavoro* (Turin: Utet, 1995), 254 et seq.; P. Campanella, 'I rappresentanti dei lavoratori per la sicurezza', in *Le nuove regole per la salute e la sicurezza dei lavoratori. Commentario al D.Lgs. 9 aprile 2008, n. 81 aggiornato al D.Lgs. 3 agosto 2009, n. 106,* ed. L. Zoppoli, P. Pascucci & G. Natullo (Milan, Ipsoa, 2010), p. 471 et seq.; M. Ricci, 'Sicurezza sul lavoro: controllo e partecipazione sindacale tra iure condito e de iure condendo', *Il lavoro nella giurisprudenza,* no. 2 (2008): 120 et seq.; A. Tampieri, *Sicurezza sul lavoro e modelli di rappresentanza* (Turin: Giappichelli, 1999), 115 et seq; L. Miranda, *La dimensión colectiva de la tutela del entorno de trabajo en Europa: perfiles comparativos entre Italia, Francia y Eslovenia* (Albacete: Bomarzo, 2012), 125 et seq.
69. L. Miranda, *La dimensión colectiva de la tutela del entorno de trabajo en Europa: perfiles comparativos entre Italia, Francia y Eslovenia* (Albacete: Bomarzo, 2012), 135 et seq.

revealed not so much in terms of the overlapping of the WSR's functions with those of the workers' general representatives (which remain) as, rather, in the legislator's specific opting in favour of a system clearly marked by the attempt to exploit the participatory prerogatives of workers' representatives to the full and to guarantee their actual presence in all workplaces by institutionalizing the territorial representative bodies and developing the powers and competences devolved to them.[70]

The innovative force of Legislative Decree no. 81/2008 immediately becomes clear upon a simple reading of Article 47(1), which states, 'The workers' safety representative shall be established at a territorial or sectoral level, at an undertaking level and at a production site level.'

Indeed, the use of the expression *shall be established* is an explicit statement of the national legislator's intention: the outlining of three levels of representation unequivocally communicates the obligatory nature of such representation in all productive activities.[71] The territorial level is correspondingly accorded pride of place amongst the levels of representation, which fact makes it possible to observe its generally subrogating nature when compared to the undertaking and the production site levels.

If, in this respect, the legislator's choice in favour of the mandatory presence of safety representatives is evident, Article 47 of Legislative Decree no. 81/2008 tackles and clarifies some of the most important provisions on the subject previously identified by Legislative Decree no. 626/94.

In the first place, Article 47(2) of Legislative Decree no. 81/2008 re-proposes the formulation according to which the Workers' Safety Representative is to be elected or appointed in all undertakings or production units. The said provision nevertheless assumes a more stringent connotation if read in the light of the provision relating to the establishment of the WSR, set out in the first section.

Dealing with the actual election or designation of the WSR, however, the subsequent sections (3) and (4) re-propose the distinction between undertaking or production units with more or less than fifteen employees that was formerly contained in Article 18 of Legislative Decree no. 626/94: the effects of the distinction from a practical/applicative point of view clearly change.[72]

With reference to undertakings or production units employing up to fifteen employees, in fact, Article 47(3) of Legislative Decree no. 81/2008 provides that the

70. M. Lai, 'Il ruolo delle parti sociali', in *Il testo unico della salute e sicurezza nei luoghi di lavoro,* ed. M. Tiraboschi (Milan:Giuffrè, 2008), 519 et seq.; A. Baldassarre, 'Le rappresentanze dei lavoratori per la sicurezza e il rilancio della filosofia partecipativa', in *Il testo unico della salute e sicurezza nei luoghi di lavoro,* ed. M. Tiraboschi (Milan:Giuffrè, 2008), 533 et seq.

71. See, L. Miranda, *La dimensión colectiva de la tutela del entorno de trabajo en Europa: perfiles comparativos entre Italia, Francia y Eslovenia* (Albacete: Bomarzo, 2012), 136.

72. P. Pascucci, 'Dopo la legge n. 123 del 2007. Titolo I del d.lgs. 9 aprile 2008, n. 81 in materia di tutela della salute e della sicurezza nei luoghi di lavoro', http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DAntona/WP%20CSDLE%20M%20DAntona-IT/20111025-121117_pascucci_n73-2008itpdf.pdf > , vol. 73, 140 et seq.; M. Lai, 'Il ruolo delle parti sociali', in *Il testo unico della salute e sicurezza nei luoghi di lavoro,* ed. M. Tiraboschi (Milan:Giuffrè, 2008), 519 et seq.

WSR must, 'as a rule'[73] be elected directly by the workers from amongst themselves or must be identified, in relation to more than one undertaking in the territory or sector of production, in accordance with Article 48 of Legislative Decree no. 81/2008.

Article 47(4) of Legislative Decree no. 81/2008, however, confirms the provision contained in Article 18(3) of Legislative Decree no. 626/94 that 'the workers' safety representative shall be elected or designated by the workers in the context of the trades union representation in the undertaking', without prejudice to the fact that 'in the absence of such representation, the representative shall be elected by the undertaking's workers from amongst themselves'. Thus the legislator's preference for the overlapping of internal trade unions representation with safety representation that had already characterized Legislative Decree no. 626/94 is confirmed.

A difference of primary importance may nevertheless be identified in terms of the concrete enforcement measures, should there be no election or designation of the WSR either in undertaking with fewer than fifteen workers or – and this constitutes a novelty that is particularly in line with the legislator's goal – in those with more than fifteen workers. Indeed, in such cases, the legislator expressly provides (in Article 47(8) and 48(1) of Legislative Decree no. 81/2008) for the subrogating intervention of the territorial workers' safety representative, establishing that the latter shall exercise the powers of the WSR with reference to all the undertakings or production units in the territory or sector of competence *in which the workers' safety representative has not been elected or designated* and not just *in undertakings that employ up to 15 employees,* as was previously the case, pursuant to Article 18(2) of Legislative Decree no. 626/94.

The novelty of this provision is to be considered fundamental also in terms of the actual presence of territorial representation within undertaking, insofar as Legislative Decree no. 81/2008, unlike Article 18(2) of Legislative Decree no. 626/94, is no longer couched in terms of the merely potential subrogating intervention of the territorial representation but, rather, imposes it in cases where the undertaking's WSR is not elected or designated, whatever the size of the undertaking may be.[74]

As regards the powers of the Safety Representatives at every level, however, the Italian path to implementing the measures fostering the balanced participation referred to in Framework Directive is twofold in its nature: basically a-conflictive, with reference to the powers regarding training, information and consultation, and conflictive when, in the absence of agreement between the employer and the workers' specialist representatives in the first instance, the latter can take action directly.[75]

Under the new legislative framework, therefore, consultation with the WSR is characterized by its timeliness and priority with regard to the most important of the employer's decision-making processes concerning the protection of workplace safety.

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73. P. Pascucci, 'Dopo la legge n. 123 del 2007. Titolo I del d.lgs. 9 aprile 2008, n. 81 in materia di tutela della salute e della sicurezza nei luoghi di lavoro', http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DAntona/WP%20CSDLE%20M%20DAntona-IT/20111025-121117_pascucci_n73-2008itpdf.pdf > , vol. 73, 142.
74. See, L. Miranda, *La dimensión colectiva de la tutela del entorno de trabajo en Europa: perfiles comparativos entre Italia, Francia y Eslovenia* (Albacete: Bomarzo, 2012), 140 et seq.
75. L. Miranda, *La dimensión colectiva de la tutela del entorno de trabajo en Europa: perfiles comparativos entre Italia, Francia y Eslovenia* (Albacete: Bomarzo, 2012), 183 et seq.

Whilst it cannot be deemed binding on the employer, it is an essential prerequisite, enabling representatives to participate in the employer's decision-making in a technical sense, making proposals and checking that the safety measures are implemented.

In such a perspective, Legislative Decree no. 81/2008 has sought to solve one of the most critical aspects of Legislative Decree no. 626/1994. To the WSR's powers under Article 50, it has added the principle that consultation must take place regarding two employer's decisions of primary importance: designation of the occupational health physician and, more importantly, the organization of training in general (and, therefore, no longer just the training for the officers responsible for emergencies[76]).

If consultation takes place regarding the most important health and safety topics and encompasses the very great majority of employer's decisions potentially affecting the management of health and safety, the problematic side to the provision therefore lies in the fact that the opinion of the WSR is not binding. More precisely, where the views on the workplace safety measures that have been or are to be adopted are not identical, the naturally conflictive tendency of Italian industrial relations therefore reappears.[77] Safety representatives are consequently recognized as enjoying, *in primis,* the right of access to workplaces and, second, the right to present observations during inspection and monitoring visits made by public authorities. These rights are completed by the right/duty to alert the person responsible in the undertaking to the risks the representative has identified during the course of his or her work and the fundamental right to have recourse to the competent authorities, inspection services and ordinary courts, should the safety measures adopted by the employer not be deemed appropriate.

Implementation of the balanced participation provisions is also enhanced by the provision of further, specific powers for safety representatives. These are a consequence of representatives exercising their information and consultation rights and are characterized by their priority and complementarity, if compared to the same representatives' checking duties and reporting power (regarding which, see Article 3(a) above). More specifically, they are the rights identified under letters (h) and (m) of Article 50(1) of Legislative Decree no. 81/2008, which guarantees representatives the right to promote the formulation, specification and implementation of suitable preventive measures for protecting the health and physical integrity of workers and to propose forms of preventive action.

Indeed, although the said powers constitute a mere consequence of WSR being informed and consulted and are, therefore, to be considered as subsequent to such an

76. P. Pascucci, 'Dopo la legge n. 123 del 2007. Titolo I del d.lgs. 9 aprile 2008, n. 81 in materia di tutela della salute e della sicurezza nei luoghi di lavoro', http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DAntona/WP%20CSDLE%20M%20DAntona-IT/20111025-121117_pascucci_n73-2008itpdf.pdf > , vol. 73, 148.

77. See, L. Zoppoli, 'Rappresentanza collettiva dei lavoratori e diritti di partecipazione alla gestione delle imprese', *Giornale di diritto del lavoro e di relazioni industriali*, no. 2 (2005): 432 et seq.; E. Ales, 'Informazione e consultazione nell'impresa: diritto dei lavoratori o dovere del datore di lavoro? Un'analisi comparata', *Rivista italiana di diritto del lavoro*, no. 1 (2009): 239; L. Montuschi, 'La sicurezza nei luoghi di lavoro ovvero l'arte del possibile', *Lavoro e diritto*, no. 2 (1995): 413 et seq.; G. Ferraro & M. Lamberti, La sicurezza sul lavoro nel decreto legislativo attuativo delle direttive CEE, *Rivista giuridica del lavoro*, no. 1 (1995): 50 et seq.

event, they do at the same time constitute a measure that naturally precedes and complements the monitoring and reporting rights attributed to the same representatives.[78]

Lastly, an analysis of what has been defined as the third level of representation leads to some considerations regarding the introduction of the workers' safety representative for production sites. This figure is identified in relation to specific production contexts characterized by the simultaneous presence of more than one firm. It therefore has a considerable importance in the building sector.

The establishment of the production site representative is left to the initiative of the individual WSRs, who choose him or her from among the WSR within the undertakings operating on the production site.

The legislation first identifies the production context in which the WSR for production sites may be identified. This context is characterized by the simultaneous presence of more than one undertaking or work project. The legislator's goal is therefore to promote co-operation and the co-ordination of measures monitoring and promoting safety between the various undertakings present on the same worksite and exposed to the so-called risks deriving from interference; a situation linked to the duty that, under Article 26(3) of Legislative Decree no. 81/2008, requires the commissioning entity to draw up 'a consolidated risk-assessment document indicating the measures adopted to eliminate or, where that is impossible, reduce the risks deriving from interference to the minimum'.

The establishment of the WSR for production sites therefore meets the need to tackle the significant danger to the safety of workers operating in complex business structures. This in view of the simultaneous presence of specific risks inherent to individual undertakings' activities and risks deriving from the concomitant presence of different undertakings' employees and therefore caused by reciprocal interference between the various activities present in the same theatre of work.[79]

[C] The Role of the Joint Committees and their Relevance in the Building Sector

The Italian legal order assigns a fundamental role in occupational health and safety management to Joint Committees (hereinafter JC). These are identified by Article 2(ee) of Legislative Decree no. 81/2008 as bodies founded on the initiative of one or more of the employer/workers comparatively most representative organization at national level.[80] They are given the task of participating further, at a territorial level.

78. L. Miranda, *La dimensión colectiva de la tutela del entorno de trabajo en Europa: perfiles comparativos entre Italia, Francia y Eslovenia* (Albacete: Bomarzo, 2012), 191.
79. See *Corte di Cassazione* (*Sezione Lavoro*), Judgement no. 45/2009, reported in *Argomenti di diritto del lavoro* no. 3 (2009): 800 et seq.
80. P. Passalacqua, *voce Enti Bilaterali*, vol. IV of *Digesto delle discipline privatistiche - Sezione commerciale* (Turin: Utet, 2008), 236 et seq.; L. Miranda, *La dimensión colectiva de la tutela del entorno de trabajo en Europa: perfiles comparativos entre Italia, Francia y Eslovenia* (Albacete: Bomarzo, 2012), 210 et seq.

It is the defining framework contained in Article 2(ee) of Legislative Decree no. 81/2008 that states this, specifying that the said bodies are privileged places for programming training activities and formulating and consolidating good preventive practices, developing actions connected with health and safety at work, assisting undertakings in fulfilling their health and safety duties and every other activity or function assigned them by law or by the collective agreements of reference.

Over and above the essential function of resolving disputes concerning application of the rights to representation, information and training, in accordance with all that was previously indicated by Article 20 of Legislative Decree no. 626/1994, the legislator therefore accords the JC the fundamental role of privileged places for adopting measures actively geared to completing the participatory framework outlined by the legislation. The task of orienting and promoting training assumes a particular importance.

In completion of their specific functions, the same JC are also given the fundamental task of supporting undertakings in the identification of technical and organizational solutions aimed at guaranteeing and improving the protection of health and safety at work.[81] To such end, provided that they have staff with the relevant specific technical competences, the JC are entrusted with a particularly important task since they are given the power to carry out on-site inspections in workplaces falling within the territory and sector of production for which they have competence.[82] In such a sense, therefore, JC support undertakings in identifying specific shortcomings in health and safety protection and promote the interventions needed to make workplaces safe.

Lastly, the JC's role and functions have been enhanced by Article 30 of Legislative Decree no. 106/2009. This amended Article 51 of Legislative Decree no. 81/2008 by inserting sections 3 *bis* and 3 *ter* which attribute to (truth to tell) not better specified 'technically competent joint commissions' (to be set up within the joint committees) the important functions of:

> certifying performance of the activities and services supporting undertakings' systems, including 'asseverazione' (i.e. certification by professional experts) of the adoption and effective implementation of the models of safety organization and management referred to in Article 30, of which the supervisory bodies can take account for the purposes of programming their activities.[83]

81. As Art. 51(3) of Legislative Decree no. 81/2008 puts it.
82. Sections 6 and 7 of Art. 51 of Legislative Decree no. 81/2008 complete the said power by providing for the duty on bilateral bodies to send an annual report on their activities to the Regional Committee co-ordinating preventive and monitoring activities referred to in Art. 7.
83. The joint committees system has an important role in the building sector, where the social partners (through collective bargaining) accord the territorial joint committees and the body that unites them at a national level, the CNCPT – *Commissione Nazionale dei Comitati Paritetici Territoriali* – fundamental policy-setting, monitoring and co-ordination functions as well as that of liaising with other national bodies with competence for safety and prevention. Thus structured at a national level, the System has a network of ninety-eight bilateral committees distributed throughout the provincial territories. In accordance with legal requirements, each territorial body has the goal of studying general and specific problems concerning accident prevention, work hygiene and, generally, improving the workplace, formulating proposals and suggestions and promoting or participating in suitable initiatives. In particular, the national

As stated earlier, Article 51(3)(*ter*) of Legislative Decree no. 81/2008 attributes important functions to technically competent joint commissions, to be set up within joint committees. These are the functions of certifying performance of the activities and services supporting undertakings' systems, including *asseverazione* of the adoption and effective implementation of the models of safety organization and management referred to in Article 30, of which the supervisory bodies can take account for the purposes of planning their activities.[84]

Such fact guarantees a double advantage to entrepreneurs. On the one hand, they can profit from a checking that, if not less rigorous, is at least programmed by the supervisory bodies since it is performed periodically under the compliance auditing procedures carried out by the JC. On the other, they have the advantage that the *asseverazione* regarding adoption of a particular model of business management and organization exempts legal entities, companies and associations (including the unincorporated associations referred to in Legislative Decree no. 231 dated 8 June 2001) from administrative liability.[85]

Confirming that the interpretation of the provisions on *asseverazione* set out above is the only one consistent with the national system of accident prevention (in terms of compatibility both with domestic constitutional law and with the European Union (EU) provisions contained in Framework Directive), the European Commission opened infringement proceedings against the Italian government on 30 September 2011. The government has been asked to explain, *inter alia*, the effects of an *asseverazione* in relation to an employer's supervisory duty.

More specifically, the European Commission is challenging the Italian government regarding the incompatibility of a preventive finding of correct supervision on the part of the employer and those whom s/he delegates (that would emerge from Article 16(3) of Legislative Decree no. 81/2008 and that can be certified by way of an *asseverazione* to the effect that the company's model of health and safety management has been drawn up correctly) with the provisions of Article 5(3) of the Framework Directive, which state: 'The workers' obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer.'[86]

Except that, in the national legislative and case law context described, the so-called principle of employer's reliability has a very limited role. This by virtue of the consideration (constantly affirmed by the constitutional case law) that such principle is not operative in situations where there exists a guarantee (such as the employer's

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and territorial committees propose initiatives directed at running prevention courses for the persons in charge of implementing both the accident-prevention legislation and the health and safety information and training interventions for construction workers, workers' safety representatives, the person responsible for the Preventive and Protective Service and for the safety co-ordinators. In addition, they provide assistance and consultations to businesses for the optimization of worksite safety standards.

84. L. Miranda, *La dimensión colectiva de la tutela del entorno de trabajo en Europa: perfiles comparativos entre Italia, Francia y Eslovenia* (Albacete: Bomarzo, 2012), 216 et seq.
85. A. Vallebona (ed.), 'Colloqui giuridici sul lavoro', no. 1 (2009), *Supplemento del Massimario di giurisprudenza del lavoro*, no. 12 (2009).
86. L. Miranda, *La dimensión colectiva de la tutela del entorno de trabajo en Europa: perfiles comparativos entre Italia, Francia y Eslovenia* (Albacete: Bomarzo, 2012), 220 et seq.

guarantee to the company's employees) which continues even in the face of a formal scrutiny of compliance with the legislative provisions conducted by the administrative supervisory bodies, given that such compliance relates to a particular, 'frozen' moment.

That is to say that the *asseverazione* of a theoretically effective model of business management and organization does not free employers a priori from their potential liability in the case of subsequent accidents. Indeed, if an accident occurs, the existence of a direct connection between the employer's act or omission, even *in vigilando*, and the event occurring must be assessed by the court.[87] This by virtue of the responsibility for safety that the legal order generally attributes to employers in principle and, more particularly, under Articles 32 and 41(2) of the Constitution and 2087 of the Civil Code. Thus entrepreneurs have to show at trial that their protective measures complied with the legal provisions, without prejudice to the court's exclusive competence to assess whether a direct connection existed between the fault and the accident at the moment when the damage occurred.

This in spite of provisions (such as the one being contested by the European Commission contained in Article 16(3) of Legislative Decree no. 81/2008) which, rather apodictically, provide for discharge of the employer's duty to supervise those to whom s/he delegates duties in those cases where the company's model of health and safety management has been adopted and effectively implemented.

That said, *asseverazione* of the adoption and effective implementation of the models of safety organization and management referred to in Article 30 of Legislative Decree no. 81/2008 does afford a partial alleviation of entrepreneurial liability in the said legislative context.

Indeed, since it constitutes a formal scrutiny of the compliance and efficiency of an undertaking's management and organizational model, it ought to facilitate the 'division of competences' between employers and the employees they have deputed to carry out specific actions to protect the workplace.

§7.07 CONSEQUENCES FOR THE PARTIES AND REMEDIES FOR BREACH OF HEALTH AND SAFETY PROVISIONS

[A] Limits on Employers' Liability

Passing now to analyse the consequences of health and safety violations and the remedies provided by the Italian legal order, it should be noted that the aim of the reform was to tackle the previous grave lack of clarity created by the co-existence of different penalty systems in the various provisions governing the subject.[88]

The legislator's intention had already been set out in Article 1(2)(f) of Act no. 123/2007. This expressly authorized the government to modify the administrative and

87. P. Pascucci, 'Delega delle funzioni su doppio binario. Cambia la responsabilità dei "vertici"', *Guida al Diritto – Il Sole 24 Ore, Speciale 'Sicurezza Lavoro'*, September 2009, 26 et seq.
88. P. Rausei, 'Il procedimento sanzionatorio', in *Il testo unico della salute e sicurezza nei luoghi di lavoro,* ed. M. Tiraboschi (Milan:Giuffrè, 2008), 721 et seq.

criminal penalty systems, taking particular account of the responsibilities and functions of each party under a legal duty.

The tools outlined by the legislator for achieving such an objective are essentially the following: modulation of the penalties to fit the risk; criminal law penalties of imprisonment or fines; the graduation of prohibition orders to fit the gravity of the particular provision breached and, lastly, recognition of the possibility, in certain cases, for trade union organizations and associations of victims' families to exercise the rights and powers accorded injured parties.[89]

It has already been stated how neither the principle of workers' involvement nor the possibility for employers to delegate almost all their health and safety management duties can exclude their liability in the case of a worker's accident. This, whether the accident is caused by a failure to adopt appropriate protective measures or whether it may be imputed to the entrepreneur's failure to monitor his or her employees' application of the said measures. Thus, alongside the employer's duty to organize concrete instruments of protection and prevention, there exists a further duty to monitor and carry out checks.

The main problems have arisen, however, in cases involving accidents marked by a worker's contributory negligence. In such circumstances, the case law has rigidly upheld the employer's liability, repeatedly stating that, 'the worker's possible contributory negligence cannot in any way exempt the employer'.[90] Thus the employer's duty has been further extended to include even the accidents caused by a worker's inattention, incompetence, negligence or imprudence.[91] It is therefore evident that employers have a duty to foresee and prevent their own workers' negligence.[92] It follows that the employer's liability is only excluded 'where the conduct of the worker presents features that are exceptional, abnormal or excessive when compared to the work procedure and the precise organizational directions received, such conduct being wholly unforeseeable or unimaginable'.[93]

As specified by the case law, 'abnormal conduct' is to be understood as that form of behaviour that 'by its strangeness and unpredictability, places itself outside every possible form of control on the part of the persons supervising application of the measures for preventing accidents at work'.[94] Abnormal behaviour is therefore something that contrasts with a worker's 'normal' conduct, where normality is to be

89. P. Pascucci, 'Dopo la legge n. 123 del 2007. Titolo I del d.lgs. 9 aprile 2008, n. 81 in materia di tutela della salute e della sicurezza nei luoghi di lavoro', http://csdle.lex.unict.it/Archive/WP/WP%20CSDLE%20M%20DAntona/WP%20CSDLE%20M%20DAntona-IT/20111025-121117_pascucci_n73-2008itpdf.pdf > , vol. 73, 158; P. Rausei, 'Il procedimento sanzionatorio', in *Il testo unico della salute e sicurezza nei luoghi di lavoro,* ed. M. Tiraboschi (Milan:Giuffrè, 2008), 768 et seq.
90. See, in the case law, *ex plurimis, Corte di Cassazione (Sezione Lavoro),* Judgement nos. 7454/2002 and 16253/2004.
91. See *Corte di Cassazione (Sezione Lavoro),* Judgements no. 7328/2004, no. 5920/2004, no. 7454/2002, no. 13690/2000 and no. 1687/1998 and *Corte di Cassazione (Penale, IV Sezione*), Judgement no. 7735/2008.
92. S. Bellumat, 'Responsabilità dell'imprenditore e concorso di colpa del lavoratore in materia di danno da infortunio', *Rivista italiana di diritto del lavoro*, no. 1 (2005): 103 et seq.
93. So held the *Corte di Cassazione (Penale, IV sezione)* in its Judgement no. 7735/2008.
94. So held the *Corte di Cassazione* (*Penale, IV sezione*) in its Judgement no. 14440/2009.

considered commensurate with the given ordinary working practices. It must therefore be understood in terms of whether or not it is typical of such practices.[95]

From a criminal law perspective, furthermore, the majority of offences regarding safety at work are offences of 'gross negligence through omission'. Indeed, their essence lies in the violation of a legal requirement to take action to avoid certain consequences. The legal requirement may be identified in the law but may also be found in regulations, administrative measures and contracts. For this reason, criminal liability regarding occupational accident prevention has many broad points of contact with private law and labour law, in particular. The said offences therefore crystallize not in a pre-defined criminal action but through conduct that is characterized by a failure to observe laws, regulations or rules of conduct.

Precisely in this respect, it is of fundamental importance to emphasize how a recent judgment of the Turin Criminal Court (delivered on 16 April 2011, in a very famous reported case involving failure to take precautionary accident-prevention measures: Tyssen-Krupp) led, in a wholly innovative manner, to the conviction of the employing business's managing director for grossly negligent manslaughter. The judgment therefore establishes that employers will be liable for their grossly negligent failure to organize precautionary accident-prevention measures when, accepting the risk that the accident may occur, they do not conscientiously introduce all the safety measures needed to prevent such an event.

[B] Forms of Liability for Breach of Health and Safety Provisions

As far as its penalty system is concerned, Italian health and safety law is characterized by a double plurality: the plurality of parties that may be held liable and the plurality of categories of liability. As regards the latter aspect, breach of the legal provisions gives rise not only to a criminal liability but also an administrative one, in addition, obviously, to the civil law liability to pay compensation.

The first two forms of liability extend to all the parties involved in the system of prevention and protection. Indeed, employers, managers, supervisors, manufacturers, project designers, fitters, the occupational health physician and workers are all answerable, both in criminal and in administrative law. As regards civil law liability, however, it is fairly clear that this attaches only to the employer (commissioning entity included).

Another aspect concerns the contractual or non-contractual nature of the civil liability. The choice has important consequences since in Italy the law governing the two forms of liability is different. On the one hand, civil liability, in this domain, must be traced back to a contractual one, since the duty created by Article 2087 of the Civil Code is based on the work relationship which is, precisely, contractual in nature, at least according to the majority of legal scholars.[96] Workers may therefore quite

95. See *Corte di Cassazione (Sezione Lavoro),* Judgement no. 5920/2004.
96. *Contra* R. Scognamiglio, 'La natura non contrattuale del rapporto di lavoro', *Rivista italiana di diritto del lavoro*, no. 1 (2007): 379 et seq.

legitimately bring typical contract law actions, including actions for specific performance, pursuant to Article 1453(1) of the Civil Code, or for partial exemption from performance, pursuant to Article 1460 of the Civil Code, which permits workers to refuse to work in a situation of imminent danger to their health.

The issue merits a more detailed analysis, however, if one considers that, under Article 32 of the Constitution, health is, above all, a fundamental personal right that transcends an individual's qualification as a worker, since it is recognized by everyone, whether or not a work relationship exists. Freed from contractual ties, the right to health would find its protection in Article 2043 of the Civil Code, under which the violation of the right to health is classified as a tort. Faced with this possibility, the case law recognizes that a concurrence of the two types of liability may arise, should the employer's conduct simultaneously injure the right to health and prejudice the worker's psycho-physical integrity.[97]

The choice between one or the other kind of action would be left to the worker. Some legal scholars are, however, opposed to admitting the possibility of a concurrence of the two forms of liability, although they acknowledge that the safety duty pertains to rights that transcend the work relationship.[98] Indeed, that this aspect of the safety duty is compatible with the regime of contractual liability appears plausible.

Another distinctive feature of the Italian system for managing occupational health and safety concerns the penalties system. As we have seen, by making the majority of the breaches a criminal offence and a considerable number of them administrative law violations, Legislative Decree no. 81/2008 outlines a particularly stringent system of penalties for employers, managers, supervisors, project designers, manufacturers, suppliers and fitters, the occupational health physician and both employed and self-employed workers.

It therefore follows that, in the case of specific breaches of the preventive provisions, the authors may be liable to criminal law penalties, on the one hand, and administrative law ones on the other. This is naturally in addition to their civil law compensatory liability for 'differential damages' i.e., damages exceeding the legally defined maximum covered by INAIL, should the said breaches have caused occupational accidents or disease. This situation is capable of generating the phenomenon known as a 'material accumulation of penalties', whereby a separate penalty is applied for every breach committed *(tot crimina tot poenae*).

It is the grounds for protecting the constitutionally guaranteed right to health that justify such a penalties system and legitimize consideration of the administrative and criminal 'wrongs' breaching health and safety law as distinct and independent of each other in the abstract, even though they occur simultaneously.

The general principle informing the adoption of sanctions for health and safety offences is therefore to include a separate head for each breach or omission or, where appropriate, in relation to every victim of the same.

97. The hypothesis is one of 'multiple-offence conduct', as outlined (along with others) in *Corte di Cassazione (Sezione Lavoro),* Judgement no. 2569/2001.
98. L. Montuschi, 'L'incerto cammino della sicurezza del lavoro fra esigenze di tutela, onerosità e disordine normativo', *Rivista giuridica del lavoro*, no. 2 (2001): 508 et seq.

Only in residual cases does the opposite principle apply, according to which the penalty may be applicable only once, on the assumption that a single wrong has been committed. This provided that the employer can demonstrate the unitary nature of his or her behaviour, even if it has had the consequence of failing to observe more than one rule.

[C] Types of Penalty and Consequences in Case of Breach of Health and Safety Regulations

As far as the criminal law context is concerned, Legislative Decree no. 81/2008 provides for imprisonment and fines whereas, from a civil law point of view, it establishes the duty to pay damages.

As regards the first aspect, the cases exclusively punishable with imprisonment are very limited when compared to the original intention of the Parent Act (Act no. 123/2007) to introduce highly repressive legislation. Breaches of particular gravity are punishable with up to three years' imprisonment.[99] Far more frequently, however, the two criminal law penalties of imprisonment and fines are combined.

From the civil law point of view, only physical damage (i.e., the damage referred to under Article 2043 of the Civil Code) was considered compensable in the past. The fact that new categories of damage (such as psychic injury) have subsequently emerged has caused the legal scholars to ask themselves whether the traditional distinction between pecuniary damage and non-pecuniary damage may be left behind in order to achieve a general and all-inclusive protection of the person.

The courts have intervened in this area on several occasions. An important judgment of the Constitutional Court[100] confirmed the bipartition of the two categories but interpreted Article 2059 of the Civil Code more broadly, including pain and suffering within the category of non-pecuniary damage.

Having clarified this point, it must be asked whether injury of a constitutionally recognized right, such as the right to health, may give rise to compensation not just for physical injury but also for psychic injury. The answer is certainly in the affirmative. So much so that reference has been made to a 'new season of non-pecuniary damage'.[101]

In the light of these considerations, breach of the provisions protecting workers' health and safety will therefore give rise to actions for both pecuniary and non-pecuniary damages. The judge will quantify the compensation equitably, taking the injured party's level of remuneration as a point of reference.

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99. The only three categories punished exclusively with imprisonment are: failure to assess or incomplete assessment of the risks in businesses exposed to particular types of risk (Art. 55(2)); imprudent assignment of tasks within certain businesses (Art. 55(4)(c)) and lastly, failure to observe a suspension order (Art. 14(10)). It is clear that the first two are really special aggravating factors whereas the last category is an infringement of a general nature. P. Rausei, 'L'arresto', in *Il testo unico della salute e sicurezza nei luoghi di lavoro,* ed. M. Tiraboschi (Milan:Giuffrè, 2008), 737 et seq.
100. See *Corte Costituzionale*, Judgement no. 233/2003.
101. M. C. Cimaglia, 'Il nuovo danno non patrimoniale fa il suo ingresso nel diritto del lavoro (Commentary on the Judgement issued by the Court of Tempio Pausiana (sez. lav.) 10.07.2003)', *Rivista italiana di diritto del lavoro*, no. 1 (2004): 311 et seq.

Alongside the right to damages, workers keep their right to have their job held open for them for as long as is necessary to make a full recovery from an occupational accident.

To such end, in fact, the general rule contained in Article 2110 of the Civil Code provides that, in cases of occupational accident or disease (in addition to pregnancy or breast feeding), the duty to perform is to be suspended and the employer cannot dismiss the worker before expiry of the period of job preservation (the so-called grace period) specifically identified in collective agreements.

This general rule is, nevertheless, subject to a strict qualification in situations generated by a breach on the part of the employer. Indeed, where it is ascertained that the occupational accident or disease is to be imputed to a breach of the employer's, the days required to return to a state fit for work are not included in the calculation of the grace period.

This insofar as the impossibility of working, in such a case, may be imputed to the conduct of the same party that is destined to benefit from the said work, namely, the employer.

Analogously, the employer is under a duty, where possible, to reinstate the worker in the same position that s/he previously occupied, once s/he has recovered. Where the worker's physical integrity is incompatible with the duties previously carried out, s/he must be guaranteed reinstatement in another position that enjoys equal professional status and remuneration.

Whilst confirming the pre-eminence classically accorded to criminal law wrongs over administrative law ones, Legislative Decree no. 81/2008 equally provides for a considerable body of administrative law fines, as well as suspension of the undertaking's activity.[102]

Having analysed the general types of penalty identified by the legislation, it is appropriate to trace a general outline of the breaches typified by Legislative Decree no. 81/2008. Following the scheme applied by Legislative Decree no. 626/1994, these may be sub-divided into two macro areas.

Indeed, on the one hand, there are the forms of conduct and omissions of a general nature constituting breaches of the safety measures required by Title I of Legislative Decree no. 81/2008. In this context, the breaches that most stand out are those deriving from: failure to draw up or adopt the risk-assessment document; failure to draw up the Emergency and Evacuation Plan; failure to provide general and practical training; failure to set up the Preventive and Protective Service and appoint the person responsible for it, and lastly, failure to appoint the occupational health physician.

On the other, there are penalties that relate to the specific risks present in the workplace as it is organized by the employer. These are set out in the other Titles into which Legislative Decree no. 81/2008 is sub-divided. In their detail, they integrate the general provisions, taking care of the breaches involving: workplaces; use of working apparatus and personal protective equipment; temporary or mobile worksites; occupational health and safety signs and notices; the manual handling of heavy loads;

102. P. Rausei, 'Le contravvenzioni e le sanzioni amministrative', in *Il testo unico della salute e sicurezza nei luoghi di lavoro,* ed. M. Tiraboschi (Milan: Giuffrè, 2008), 729 et seq.

apparatus equipped with visual display units; physical agents; dangerous substances (chemical agents, carcinogenic and mutagenic agents; exposure to asbestos); exposure to biological agents and, lastly, protection from explosive atmospheres.

Precisely the sub-division of breaches into the categories typified in Title I of Legislative Decree no. 81/2008 and those provided for by the specific provisions in the law's other titles has required the legislator to adopt the so-called principle of a breach's specificity in Article 298. According to this principle, when one and the same fact is punishable under a provision contained in Title I and by one or more provisions contained in the other titles of Legislative Decree no. 81/2008, the judge is bound to apply the specific provision.

Lastly, regarding specific violations, the formulation of the administrative law penalty of suspension of an undertaking's activity is particularly important. This is contained in Article 14 of Legislative Decree no. 81/2008, which has been heavily amended by Legislative Decree no. 106/2009.[103] The provision in question permits the supervisory bodies at the Ministry of Labour and Social Security to issue orders suspending entrepreneurial activity in the occurrence of certain forms of conduct on the part of the employer.

In its original formulation, Article 14 identified three categories of conduct punishable with a suspension order. In the first place, the employment of staff not appearing on the books or in other mandatory documentation and representing 20% or more of the workers present in the workplace. In the second place, serious and repeated breaches of provisions protecting workers' health and, lastly, repeated breaches of the law governing overtime and both daily and weekly rest periods.

Precisely in relation to this last category, the original formulation of Article 14 referred to:

> repeated breaches of the law governing overtime and both daily and weekly rest periods referred to in Articles 4, 7 and 9 of Legislative Decree no. 66, dated 8 April, as subsequently modified, considering the gravity of the exposure to the risk of an accident.[104]

In this way, the negative impact on workers' health and safety caused by breaches of the working time regulations was emphasized and consequently punished, given the legislator's express reference to the increased risk of an accident. Moreover, the suspension order was added to the administrative law penalties already established for breach of the working time provisions by Legislative Decree no. 66/2003.

Article 14's current formulation (introduced when Legislative Decree no. 106/2009 came into force) maintains the first two (possible) penalties but eliminates the reference to repeated breaches of the working time provisions. Thus the supervisory bodies' power to issue the related suspension order is excluded. As a consequence, what could have been interpreted as a sign of particular attention towards working time, in terms of its impact on workers' health and safety, no longer exists today. This

103. P. Pascucci, 'Delega delle funzioni su doppio binario. Cambia la responsabilità dei "vertici"', *Guida al Diritto – Il Sole 24 Ore, Speciale 'Sicurezza Lavoro'*, September 2009, 24 et seq.
104. Article 4 concerns the maximum working time. Art. 7 covers daily rest and Art. 9 contains the law governing weekly rest.

has had a negative impact on that 'safety culture' that would appear to be the mainstay of Legislative Decree no. 81/2008.

[D] Adoption of a Proper System of Occupational Health and Safety Management

One of the most important innovations in occupational health and safety is to be found in Article 30 of Legislative Decree no. 81/2008.

This provision establishes the requisites for the organization and management models capable of averting liability for the administrative officers of legal entities, companies and associations, including unincorporated associations as defined by Legislative Decree no. 231/2001.[105] It ascribes to the organization model adopted by undertakings the fundamental functions of collaborating in risk-assessment, preventing risks, programming the training and monitoring activities and, lastly, managing emergencies.[106]

With the intention of permitting undertakings to manage health and safety, production quality and their environmental impact management (already regulated by Legislative Decree no. 231/2001) in an integrated manner, Article 30 of Legislative Decree no. 81/2008 identifies the Occupational Health and Safety Management System (hereinafter also referred to as WHSMS) as an organizational model that is geared to achieving the business's health and safety objectives but planned in such a way as to observe the most appropriate costs-benefits ratio.

Article 30 further provides that, during initial compliance with Legislative Decree no. 81/2008, organizational models conforming to the UNI-INAIL (*Principi Uniformi Istituto Nazionale Infortuni sul Lavoro*) Guidelines dated 28 September 2001 and British Standard OHSAS 18001:2007 shall be deemed to comply with the legal requirements and therefore create a legal presumption of exoneration from criminal liability for administrative officers. The presumption is clearly rebuttable and operates exclusively for the purposes of recognizing the exonerating 'suitability' requisite. A doubt remains, however. One based on the fact that a generalization is thus made, a priori, without checking whether the models in question actually function effectively.[107]

A particularly important grey area of Article 30 is whether application of the related organizational models is only pertinent to the administrative and criminal

105. A. Lanzi & P. Aldrovandi. 'L'applicazione del D.Lgs. n. 231/2001 sulla responsabilità amministrativa degli Enti per fatto di reato, ai delitti di omicidio colposo e lesioni personali colpose commessi con violazione delle norme antinfortunistiche. Commento all'art. 9', in *Legge 3 agosto 2007, n. 123. Commentario alla sicurezza del lavoro. Misure in tema di tutela della salute e della sicurezza sul lavoro e delega al governo per il riassetto e la riforma della normativa in materia*, ed. F. Bacchini (Milan: Ipsoa-Indicitalia, 2008), 225 et seq.

106. L. Golzio & A. Montefusco, 'Modelli di organizzazione e gestione', in *Il testo unico della salute e sicurezza nei luoghi di lavoro,* ed. M. Tiraboschi (Milan: Giuffrè, 2008), 391 et seq.; L. Miranda, 'Organizzazione del lavoro e sicurezza negli accordi del Gruppo Fiat-Chrysler. Verso un comune modello di rappresentanza paritetica per la sicurezza?', *Diritti lavori mercati*, no. 1 (2012): 101 et seq.

107. P. Tullini, 'I sistemi di gestione della prevenzione e della sicurezza sul lavoro', *Giornale di diritto del lavoro e relazioni industriali*, no. 3 (2010): 407 et seq.

liability of the employer as a legal entity or whether the Article has a wider-ranging impact. Indeed, some legal scholars argue that adoption of the Article 30 models may also exclude the employer's criminal liability in those cases where s/he delegates his or her functions. In fact, by virtue of the corrective Decree no. 106/2009, the employer's monitoring duty in cases of delegation 'shall be deemed to have been performed where the checking and inspection model referred to in Article 30(4) has been adopted and effectively implemented'. It would thus be possible to speak of an exempting effect in favour of the employer not only as a juristic person but also as a natural person.[108] This interpretation cannot be supported. Indeed, reading the provision's wording in the light of the case law it has produced, it can be observed that the criminal liability for workplace safety offences is characterized by a double negligence. Generic, in the case of breach of the detailed preventive rules, and specific, for breach of Articles 589 and 590 of the Criminal Code, insofar as the former are offences involving danger and mere conduct, whilst the latter are offences causing harm and having consequences.[109]

Analogously, civil law liability has been characterized by the need for the event to be referable to the employer's fault: for breach or failure involving conduct-related duties imposed by law or required by technological developments, provided that they are concretely identified.[110]

In this legislative and case law context, the so-called principle of 'employer's reliability' has always played a very limited part.[111] This by virtue of the consideration (constantly asserted in the case law[112]) that the said principle is not operative in situations where a protected position (such as that of employees vis à vis their employer) exists.

Such fact also resolves the problem of whether adoption of the organizational models in question may also influence evaluations of an employer's civil liability. Indeed, it should be noted that management systems do not only affect business organization but also imply a standardization of the employer's duty under Article 2087 of the Civil Code. They therefore become instruments for measuring the adequacy of contractual performance.[113] If that is true, it is equally appropriate to separate the relationship between the undertaking and its organizational model, on the one hand, from that between employer and worker, on the other. That is to say, discharge of the safety duty under Article 2087 of the Civil Code in the ways prescribed by Article 30 of Legislative Decree no. 81/2008 will only be significant under the first profile and therefore satisfy the legality test with regard to the public monitoring bodies. It does not affect the safety duty the employer owes to his or her workers, who are the only parties

108. A. De Vita & M. Esposito, *La sicurezza sui luoghi di lavoro. Profili della responsabilità datoriale*, (Naples: ESI, 2009), 73 et seq.
109. See, *ex plurimis*, *Corte di Cassazione* (*Penale, IV Sezione*), Judgement no. 35773/2001.
110. See, *ex plurimis, Corte di Cassazione (Sezione Lavoro),* Judgement no. 12863/2004.
111. See, *Corte di Cassazione (Penale IV Sezione),* Judgement no. 18290/2003.
112. See, *ex plurimis, Corte di Cassazione (Penale, IV Sezione),* Judgement no. 7032/1999.
113. P. Tullini, 'I sistemi di gestione della prevenzione e della sicurezza sul lavoro', *Giornale di diritto del lavoro e relazioni industriali,* no. 3 (2010): 407 et seq.; L. Miranda, 'Organizzazione del lavoro e sicurezza negli accordi del Gruppo Fiat-Chrysler. Verso un comune modello di rappresentanza paritetica per la sicurezza?', *Diritti lavori mercati*, no. 1 (2012): 101 et seq.

having the right to health.[114] The adoption of particular models of business organization therefore cannot erode the responsibility principle underpinning the regulation of health and safety at work.

[E] The Interaction between Health and Safety Regulation and the Social Security System

Alongside what is described above regarding the criteria for employers' liabilities, in the Italian legal system, under the profile of compensation for damages suffered by the worker, there is a close link between the health and safety preventive legislation and the social security system.[115]

Health and safety of the workers, in fact, is guaranteed not only through the application of the accident-prevention rules, but also through the economic protection of workers who have suffered damages to their health; such a function is attributed to INAIL, through the compulsory insurance against occupational accidents and diseases.[116]

The compulsory insurance, established in 1898, provides the economic protection of the workers injured during a job activity or affected by an occupational disease. It is currently regulated by the so-called *Testo Unico*, approved by the Presidential Decree of the 30 June 1965, no. 1124, as lastly amended by Act no. 493/1999 and by Legislative Decree no. 38 of 23 February 2000. The first amendment has extended the insurance protection to familiar and unpaid activities, the second and much more important one, has extended the social insurance coverage to damages not previously protected, such as psycho-physical damages.

The system is built on the compulsory insurance stipulated by the employer with INAIL and it is financed by employers' contributions, periodically re-evaluated and commensurate with the risk of the job performances and the number of workers employed.

INAIL operates according to a typical insurance-based logic by virtue of the correspondence between contributions paid and risks linked to work, the compensatory nature of the economic treatment guaranteed to the workers and the exclusion of the liability of the employer.

The insurance, therefore, protects workers in case of accident or occupational disease, generated in reason of the work which has caused a psycho-physical impairment to the worker, through the recognition of both the free health-care and the economic benefits, predetermined in an amount not directly equivalent to the damages suffered by the worker (so-called indemnity) and variable in duration according to the permanent or temporary character of the inability.

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114. P. Albi, *Adempimento dell'obbligo di sicurezza e tutela della persona. Art. 2087 c.c.*, Vol. of *Il Codice Civile. Commentario. Fondato da P. Schlesinger,* ed. F.D. Busnelli (Milan: Giuffré, 2008), 45 et seq.
115. See, Gaeta L., *Infortuni sul lavoro e responsabilità civile. Alle origini del diritto del lavoro* (Naples: ESI, 1986).
116. See Cinelli M., *Diritto della previdenza sociale* (Turin: Giappichelli, 2012), 429 et seq.

The insurance protection, on the one hand, operates regardless of employer's fault and even if the accident has been caused directly by the employee, if originated from the job occasion; on the other hand, it does not cover injuries and illnesses leading to permanent or temporary inability less than 6% of the full work capacity with respect to psycho-physical injury and less than 16% with reference to the reduction of general aptitude to work.

This because, at the origin of the accident insurance system, there is the concept of occupational risk that is founded on the overcoming of the civil law liability principle, by introducing an alternative criterion, based, within predetermined limits, on the imputation to the employer of the objective liability related to the exercise of economic activities, still risky for workers.[117]

The adoption of such criterion has implied that the employer, within the limits of the insurance obligation, is held responsible not only for the damages suffered by the worker that may be charged to him or her as a fault-based liability, but also of those that are a consequence of fortuitous events, force majeure or fault of the worker, with the only exception for worker's purely arbitrary acts.

The mandatory insurance achieves, therefore, the so-called transactive[118] effect, since employers' sphere of responsibility is extended, but they respond within the limits of the insurance, while workers, in exchange of greater protection, receive only a partial compensation for the damage suffered, because the social security protection neither intervene for minor injuries nor guarantees the economic equivalence between the full extent of the damage and the economic indemnity paid to the worker.

Alongside the extension of liabilities to events not directly attributable to the employer, in favour of the latter operates the rule of exemption from civil liability,[119] disciplined by Article 10 of Presidential Decree no. 1124/1965, according to which the employer is not liable for damages suffered by the employee if covered by the INAIL allowance, but only for the so-called differential damages, i.e., damages exceeding the legally defined maximum amount covered by INAIL, against which must be ascertained the responsibility of the employer, according to the civil law rules, as mentioned in the above.

Pursuant to Article 10, paragraph 2, of Presidential Decree no. 1124/1965, the exemption rule does not apply if the fact constitutes a criminal offence, intentional or negligent, prosecutable at the initiative of the public jurisdictional authorities. In this case, INAIL has the right to act against the employer, who will be called to refund the amount paid by INAIL as insurance benefit to the employee.[120]

Formulated in these terms, the exemption rule of employers' liability has created, in practice, no few problems, mainly due to the – once exclusive – compensability of the material damages suffered by a worker because of an occupational accident, with the exclusion of damage not susceptible of an economic evaluation, pursuant to the

117. Così, da ultimo, Cass. Civ., Sez. Lav., no. 6002/2012.
118. Cinelli M., *Diritto della previdenza sociale* (Turin: Giappichelli, 2012), 429 et seq.
119. See, Corte Cost. 18 luglio 1991, n. 356, edited in *Foro It.,* 1991, 2967.
120. See, *ex multis,* Cass. Civ., Sez. Lav., no. 856/2012.

provisions of Article 2059 of the Civil Code, which limits the compensation of non-pecuniary damages to the sole cases provided by law.

As already stressed in the above, over the years, such a system has been substantially dismantled by the jurisprudence of the Constitutional Court, in order to protect the right to health of workers, guaranteed by the Article 32 of the Italian Constitution, which includes the recognition of non-pecuniary damages if perceived as socially relevant.

By Judgment no. 184/1986 the concept of 'biological damage' has been recognized as a damage to health, consequent to a psycho-physical damage capable of producing both economical and not-economical consequences, that find its protection in Article 2043 of the Civil Code, according to which the violation of the right to health can be classified as a tort.[121]

Nevertheless, the compensation of biological damages deriving from accidents at work, has been recognized only later on, following three judgments of the Constitutional Court in 1991 that, by overcoming the limitation of the insurance indemnity to pecuniary damages suffered by the worker, laid down the basis for the intervention of the Italian legislator.

In its Judgment no. 87 of 15 February 1991, the Constitutional Court, while not declaring unconstitutional the exclusion of INAIL coverage for non-pecuniary damages suffered by the worker, underlined the need to distinguish between the damage to the working ability and the damage to health that, as a constitutional right, shall find a protection similar to that one provided by the Presidential Decree no. 1124/1965.

However, it is only with the decisions no. 356 of 18 July 1991 and no. 485 of 27 December 1991 of the Constitutional Court that an instrument of jurisdictional enforcement in favour of workers has been found. The decisions stated, in fact, on the one hand, that the exemption of employers liability according to Article 10 of Presidential Decree no. 1124/1965 must be interpreted in the sense that it operates only with reference to the damages linked to a reduction of working ability, thus not extending up to deny the compensation of health damages suffered by the worker, according to the general rules of the Civil Code and, specifically, to Articles 2043 and 2087;[122] on the other hand, that INAIL claims against the employer cannot be extended to those damages, not covered by the accident insurance.

To such a demand of social protection, the legislator responded through Legislative Decree no. 38 of 23 February 2000 that, in Article 13, extends accident insurance compensation to biological damages, defined as the psycho-physical impairment of the employee detected by medical-legal evaluation, in addition to the pecuniary damage resulting from the same event.

The general provision contained in Article 13, Legislative Decree no. 38 of 23 February 2000, has allowed, however, over the years, the extension of the insurance

121. See, Pedrazzoli M. (ed), *Danno biologico e oltre* (Turin: Giappichelli: 1995); Busnelli F.D., *Il danno biologico. Dal 'diritto vivente' al 'diritto vigente'* (Turin: Giappichelli, 2001); V. Luciani, 'La responsabilità civile e il danno biologico', in *Ambiente e sicurezza del lavoro*, eds. M. Rusciano & G. Natullo (Turin: Utet, 2007), 485 – 502.

122. See, in general, R. Del Punta, 'Diritti della persona e contratto di lavoro', *Giornale di diritto del lavoro e di relazioni industriali*, no. 1 (2006): 195-268.

protection also against psychic damages, understood as impairment which affect the attitude of workers to participate in normal social life, such as stress, anxiety, depression, frustration, phobias etc., actually covered by the accident insurance.

It has derived the full protection of situations of damage not only attached to the merely risky operations of the productive cycle, but also linked to the organization of employer's activities.

Therefore, in the current regulatory framework of the accident insurance, mental disorders and impairments can be considered of occupational origin if caused by specific and particular conditions of the work activity and by the organization of work – situations that occur in the presence of incongruity in employers' organizational choices (the so-called *costrittività organizzativa*).

A last profile of strict interaction between the health and safety management and the Social Security System, is that of the efficacy of an entrepreneur's protective actions and the economic incidence of the corresponding duties regarding INAIL contributions. This is by way of the tried and tested *Bonus-Malus* scheme under which a low level of accidents corresponds to a lower level of contributions and vice versa.

To such end, the Ministerial Decree of 12 December 2000 (governing the new premium rates for insurance against work accidents and occupational diseases) provides, in Articles 19 and 22 respectively, for an oscillation of the average rate during the first two years of an undertaking's activity and an oscillation of the average rate on the basis of the accident track record after the first two years of activity.

In the first case, a fixed reduction or increase by 15% in the average contribution rate may be applied to an undertaking during the first two years of its activity, on the basis of the company's observance of the rules on accident prevention and occupational health and safety.

In the second case, at the end of the two years running from the start of the undertaking's activity, INAIL may, in connection both with the interventions carried out to improve workplace safety and hygiene (in implementation of the provisions of Legislative Decree no. 81/2008) and with the actual and certified realization of a valid system for managing occupational health and safety, apply a fixed reduction of 5% or 10% in the average contribution rate (according to the number of workers for the year in question). This is for those employers who have complied with the accident prevention and workplace hygiene requirements and their social security and insurance duties.

Should it become evident, at any stage, that the conditions for entitlement to the abovementioned reduction have not been satisfied, however, INAIL will annul it and request integration of the premiums due, as well as application of the civil and administrative penalties in force.

§7.08 CONCLUSIONS

As we have seen in the above, the Italian health and safety system was characterized for more than a decade by a highly fragmented regulation that risked seriously

compromising both certainty as to the law and full regulatory adaptation to important new categories of risk.

Such problems, combined with persistently worrying statistics both for occupational accidents and diseases, pushed the government to introduce by Legislative Decree no. 81/2008 an innovative regulatory framework with a view of rationalizing health and safety law both at general and at sectoral level.

If an impact assessment of Legislative Decree no. 81/2008 is still impossible, in absence of relevant case law, it is already possible to underline some innovative features that characterize the new health and safety management in practice, showing the intention of the legislator to protect not only health and safety, but even well-being at work.

These features can be divided into five main profiles, each one closely related to the other, such as: (a) the application of health and safety provisions to all sectors of production and all types of risk; (b) the innovative all-inclusive concept of 'worker'; (c) the new risk-assessment provisions; (d) the new requirements for the organization and management health and safety models; (e) rules on workers' representation.

As stated above, one of the most important features of the new national preventive legislation is its application to all sectors of activity, whether private or public, and to all types of risk, without distinctions based on the nature (i.e., entrepreneurial or non-entrepreneurial) or the type of activity pursued or, indeed, the dimensions of a business.

Under this profile, the novelties tend to guarantee a global approach to the problem of protecting safety at work, closely linked to the innovative all-inclusive concept of 'worker', that not only covers employees (regardless of the various types of contract) but also workers that, albeit not employed by the employer, are nevertheless subject to his or her managerial authority (agency workers), or self-employed, in relation to certain specific duties.

Both aspects are strictly related to the emphasis the law put on the employer's primary duty to assess risks in the workplace. In such a perspective, in fact, the new risk-assessment cannot be considered, as before, a static document that analyses only the technical risks deriving from the productive process, but it must cover all the risks to workers' health and safety potentially present in the workplace, even those linked to the organization of work and its impact on health and safety, those regarding pregnant workers and those linked to gender differences, age and provenance from other countries, regardless of the type of work contract.

In view of ensuring the maximum diffusion of the preventive measures and the certainty of responsibility in the undertakings, a very important role is played by Article 30 of the Legislative Decree no. 81/2008. It identifies the requisites for the organization and management of health and safety models, ascribing to the organization model adopted by undertakings the fundamental functions of collaborating in risk-assessment, preventing risks, programming the training and monitoring activities and, lastly, managing emergencies, attempting to ensure proper and a priori identification of positions of responsibility, the division of powers within the company, as well as the full functionality of the health and safety management in the working environment.

Similarly, the new rules on collective representation seem to be characterized by the intention to assign a more important role to the workers' specialist representatives (WSR) in the entrepreneur's organizational decisions that could affect the health and safety of all the workers present at workplace.

This happens, not only with the identification of new WSR's powers, but also, above all, through the recognition of the all-inclusive concept of 'worker' even for the purposes of applying the provisions on the participation and consultation of workers' representatives, that has the effect to facilitate, at least at the formal level and in the absence of any other legislative specification, the representation of workers not typically covered by trade union membership.

Therefore, in conclusion, the new system seems to be aimed at guaranteeing a global approach to health and safety at work, by establishing an action programme that is truly centred on a culture of accident prevention and on a constant and planned protection at work.

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